(12)

No. 89-680-CSX
Status: GRANTED

Title: James B. Beam Distilling Company, Petitioner
v.
Georgia, et al.

Docketed:
October 16, 1989

Court: Supreme Court of Georgia

Counsel for petitioner: Taylor Jr.,John L.

Counsel for respondent: Baker,Amelia Waller

Entry	Date	Note	Proceedings and Orders
1	Oct 16 1989	G	Petition for writ of certiorari filed.
2	Oct 16 1989		Appendix of petitioner filed.
3	Nov 14 1989		Brief of respondents Georgia, et al. in opposition filed.
4	Nov 21 1989		DISTRIBUTED. December 8, 1989
5	Dec 11 1989		Reply brief of petitioner James B. Beam Distilling Co. filed.
6	Jun 1 1990		REDISTRIBUTED. June 7, 1990
7	Jun 11 1990		Petition GRANTED.
			**********
8	Jul 26 1990		Joint appendix filed.
9	Jul 26 1990		Brief of petitioner James B. Beam Distilling Co. filed.
10	Aug 29 1990	G	Motion of Council of State Governments, et al. for leave to file a brief as amici curiae filed.
11	Aug 29 1990		Brief amici curiae of California, et al. filed.
12	Aug 29 1990		Brief of respondent Georgia filed.
13	Aug 29 1990		Brief amici curiae of Alabama, et al. filed.
14	Sep 4 1990		CIRCULATED.
18	Sep 26 1990		SET FOR ARGUMENT TUESDAY, OCTOBER 30, 1990. (3RD CASE)
16	Sep 28 1990	X	Reply brief of petitioner James B. Beam Distilling Co. filed.
15	Oct 1 1990		Motion of Council of State Governments, et al. for leave to file a brief as amici curiae GRANTED.
17	Oct 3 1990		Record filed.
		*	GA SC-record received.
19	Oct 30 1990		ARGUED.

No. 89-680

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JAMES B. BEAM DISTILLING CO.,

Petitioner,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Respondents.

On Petition For Certiorari
to the Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. When a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief?[1]

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[1]The issue presented here is identical to that now pending before the Court and scheduled for additional briefing and argument in McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, ___ U.S.___, 109 S.Ct. 3238 (1989). See also American Trucking Associations, Inc. v. Smith, former decision, 483 U.S. 1014, 107 S.Ct. 3252; 109 S.Ct. 389; 109 S.Ct. 1110, being considered together with McKesson on this issue.

LIST OF PARTIES

Plaintiff James B. Beam Distilling Co.'s parent corporation is American Brands, Inc., a Delaware corporation. Plaintiff has one less than wholly-owned subsidiary, which is DICO Holding Co., a Kentucky corporation.

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The decision of the Superior Court of Fulton County, State of Georgia, is not reported. The decision of the Supreme Court of the State of Georgia has not yet been reported but a copy of that decision is Exhibit "A" to the Appendix to this Petition.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of the State of Georgia sought to be reviewed was dated and entered on July 14, 1989.

The Order denying the Petitioner's Motion for Rehearing before the Supreme Court of the State of Georgia was dated and entered on July 26, 1989.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. § 1257(a).

STATUTE WHICH THE CASE INVOLVES

The statute which the case involves is O.C.G.A. § 3-4-60.[2] Its verbatim text is included in the Appendix, Exhibit "B"

STATEMENT OF THE CASE

This case arises out of James B. Beam Distilling Company's (hereinafter "James Beam") action in the Superior Court of Fulton County, State of Georgia, for the refund of taxes illegally assessed and collected from James Beam under a statute that was declared both by the trial court and the Supreme Court of the State of Georgia to be unconstitutional under this Court's holding in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049 (1984). O.C.G.A. § 48-2-35(a) requires that a Georgia taxpayer be refunded all taxes "determined to have been erroneously or illegally assessed and collected . . . ." James Beam paid the taxes and in 1985 sought a refund of taxes paid in 1982, 1983 and 1984 under this statute. In McKesson

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[2]The statute in question was amended effective 1985. The Appendix includes only the pre-amendment version, which is applicable to the facts of this case.

Corporation v. Division of Alcoholic Beverages and Tobacco, ___ U.S. ___, 109 S.Ct. 3238 (1989), this Court specifically ordered additional briefing and argument on the following issue:

> When a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause must the state provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the state elect to provide on a prospective relief?

This identical issue was presented to and passed upon adversely to the taxpayer in this case by the Supreme Court of the State of Georgia. Therefore, the Petitioner now requests grant of certiorari so that this matter may be considered with its counterparts now pending before this Court.

The taxes paid by James Beam were paid pursuant to O.C.G.A. § 3-4-60 which, prior to 1985, granted preferential taxing treatment to alcoholic beverages manufactured from Georgia-grown products. Prior to 1985, the statute taxed locally produced "distilled spirits" at $.50 per litre and locally produced alcohol at $.70 per litre, while taxing their counterparts

manufactured outside Georgia at $1.00 and $1.40, respectively. See Appendix, Exhibit "B". In 1982, James Beam paid taxes in the amount of $649,000.00; in 1983, in the amount of $857,000.00; and in 1984 in the amount of $894,000.00. Then in 1985, in the wake of Bacchus Imports, Ltd. v. Dias, O.C.G.A. § 3-4-60 was superficially amended in an attempt to correct its constitutional impropriety.

In the trial court James Beam sought and was granted summary judgment on its contention that the taxes it paid during the years in question were illegally assessed and collected because O.C.G.A. § 3-4-60, as it existed and was applied during the years in question, was unconstitutional, both in its purpose and effect. Relying on the authority of Bacchus Imports, Ltd. v. Dias, Beam asserted that the unconstitutional purpose and effect of O.C.G.A. § 3-4-60 were to discriminate against out-of-state producers of alcoholic beverages and unfairly to promote local commerce in the form of in-state producers. The unconstitutional purpose and effect were achieved by applying a tax rate to alcoholic beverages manufactured elsewhere and

imported into Georgia that was greater than the tax rate applied to in-state producers.

In the Bacchus case this Court overturned as unconstitutional a tax imposed by the State of Hawaii identical in operation to O.C.G.A. § 3-4-60. The Hawaii statute imposed a twenty percent (20%) tax on sales of liquor at wholesale; however, certain alcoholic beverages made from locally grown products were exempted from the tax. This Court held that the Hawaii tax was discriminatory and unconstitutional on its face. Therefore, James Beam alleged in the trial court, and the court so ruled, that O.C.G.A. § 3-4-60 was an unconstitutional infringement upon interstate commerce under Bacchus. A copy of the trial court's decision is included as Exhibit "C" to the Appendix.

Not only did the trial court hold that the effect of the statute was unconstitutionally discriminatory, but also found at ¶ 5 of its Conclusions of Law that the purpose/intent of the statute amounted to simple economic protectionism, "i.e., to foster . . . local industries by encouraging increased consumption

of their product." Bacchus, 468 U.S. at 269, 104 S.Ct. at 3054.

On appeal, the trial court's rulings were upheld by the Georgia Supreme Court. However, both the trial court and the Supreme Court of the State of Georgia held that their rulings as to constitutionality were to be given prospective application only so as to deny James Beam a refund of the taxes it had paid under the unconstitutional statute. In its Order of July 14, 1989, the Georgia Supreme Court determined that, rather than applying the strict letter of a Georgia statute mandating a refund, it would apply the balancing of equities test prescribed by this Court in Chevron Oil v. Huson, 404 U.S. 97, 92 S.Ct. 349 (1971), to determine the issue of retroactive application of a judicial decision.

Petitioner James Beam filed a timely petition for rehearing with the Georgia Supreme Court. The Court denied the Petitioner's Motion for Rehearing, without opinion, on July 26, 1989. The Petitioner files the instant Petition for Writ of Certiorari with respect to the judgment of the Supreme Court of the State of Georgia.

BASIS FOR FEDERAL COURT JURISDICTION

The United States Supreme Court has jurisdiction over the Petitioner's case under 28 U.S.C. § 1257(a).

ARGUMENT

By upholding the trial court's prospective application of its ruling that the pre-1985 version of O.C.G.A. § 3-4-60 was unconstitutional, the Supreme Court of the State of Georgia improperly denied Petitioner James B. Beam Distilling Company a refund of the taxes paid by James Beam pursuant to the offending statute during the years of 1982, 1983 and 1984. In support of its decision to apply its ruling prospectively only, the Georgia Supreme Court relied principally, beginning at p. 2 of its decision, on Flewellen v. Atlanta Casualty Company, 250 Ga. 709, 300 S.E.2d 673 (1983), wherein the Georgia Supreme Court adopted the three-pronged test of Chevron Oil v. Huson, 404 U.S. 97, 92 S.Ct. 349 (1971), to determine whether a judicial decision is to be applied retroactively.

Critically, before the Georgia Supreme Court in this appeal was the issue of whether a decision holding a state

statute violative of the United States Constitution under the Commerce Clause shall require a refund to the taxpayer of taxes paid pursuant to the offending statute. That issue was not presented in Flewellen or Chevron Oil and therefore, those cases are not properly applicable to the facts of this case, which involves the unconstitutional taking of property by the duly constituted taxing authority. Without considering whether its decision amounted to an effective denial of Petitioner's rights under the United States Constitution, the Georgia Supreme Court simply adopted the "balancing equities" approach endorsed by this Court in its Chevron decision. However, as this Court noted in Bacchus, where constitutional rights are involved, the issue is not so simply resolved:

> These refund issues, which are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce, were not addressed by the state courts [in earlier cases]. Also, the federal constitutional issues involved may well be intertwined with, or their consideration obviated by, issues of state law [i.e., by a refund statute].

468 U.S. at 277; 104 S.Ct. at 3058 and n. 14. However, in the instant case, although there is a state statute that would have obviated the federal constitutional considerations, the Georgia Supreme Court refused to apply it, so as to deny the Petitioner its federal constitutional right to a refund of taxes assessed in violation of the Commerce Clause.

In support of its decision the Georgia Supreme Court stated:

> We are not persuaded by Beam's argument that O.C.G.A. § 48-2-35(a) mandates retroactive application of the constitutional decision. The statute provides, 'a taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him . . .' The statute does not describe how it should be determined that a tax was 'illegally assessed.' It simply does not address the issue of retroactive versus prospective application of a constitutional decision.

James B. Beam Distilling Co. v. State of Georgia, Nos. 46642, 46681, slip op., n.2 (Supreme Court of the State of Georgia, July 14, 1989) See Appendix, Exhibit "A". The Georgia Supreme Court used this circular reasoning to deny the taxpayer the

refund to which it was entitled. Yet, as pointed out in the dissent in the Court's July 14 opinion, an unconstitutional statute is void ab initio, and is thus unconstitutional and illegal from the moment of its inception. See, e.g., Norton v. Shelby County, 118 U.S. 425, 6 S.Ct. 1121 (1886). Thus, considerations as to when the collection of the tax revenue from James Beam became "unconstitutional or illegal" should not have entered into the Georgia Supreme Court's consideration. Further, neither Chevron Oil nor the Georgia cases cited by the Georgia Supreme Court applying Chevron Oil involve an underlying statute declared to be violative of the United States Constitution, and thus void ab initio. Therefore, those cases are not controlling.

As one author has noted:

> The use of the prospectivity doctrine detracts attention from the real issues at stake, which are the State's sovereign right to preserve its treasury and the competing interest of taxpayers to a clear and certain remedy for constitutional violations. The complete denial of a refund resolves the tension between these competing interests entirely in favor of the State.

Such an unbalanced resolution threatens the very purpose of the Commerce Clause.

Tatarowicz, Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Taxes Under the Commerce Clause, 41 Tax Lawyer, 118-119 (Fall 1987).

Petitioner was denied a refund of substantial taxes paid pursuant to a Georgia statute determined by a Georgia trial court and the Supreme Court of the State of Georgia to be unconstitutional under Bacchus Imports, Ltd. v. Dias. Obviously, the remedy accorded the victims of unconstitutional taxation is bound up in the enforcement of constitutional protection. In other words, it may be that the denial of a refund of unconstitutionally collected taxes in and of itself amounts to an unconstitutional deprivation of property, as suggested in Bacchus.

That issue is squarely before this Court on appeal in McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, 109 S.Ct. 389 (1989), scheduled for further briefing and argument during October Term on the very question at issue in this petition.

CONCLUSION

Petitioner would be bound by this Court's ruling in McKesson, and the Court would need not consider briefs and argument in a separate appeal since these two matters, identical in nature, may be considered together. Therefore, Petitioner submits that this Court should grant certiorari to consider its case because it presents an important question of law regarding retroactive relief from statutes violative of the United States

Constitution, which question has not yet been but should be settled by this Court.

Respectfully submitted,

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In the Supreme Court of Georgia

Decided: July 14, 1989

46642, 46681, JAMES B. BEAM DISTILLING V.
STATE OF GEORGIA, et al.; and vice versa

MARSHALL, Chief Justice.

James B. Beam Distilling Co. (Beam) brought this action seeking a $2,400,000 refund for excise taxes it paid in 1982, 1983 and 1984. The taxes were paid pursuant to OCGA §3-4-60, which imposed a higher tax on alcoholic beverages imported into the state than on those manufactured in Georgia. The statute was amended in 1985, shortly after the United States Supreme Court found a similar statute to be unconstitutional. See, Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (104 SC 3049, 82 LE2d 200) (1984).[1] In the proceedings below, the trial court determined that the pre-1985 statute was unconstitutional because it violated the Commerce Clause of the U.S. Constitution. The court further held that the ruling would only be applied

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[1]The amended statute has been challenged and found to be constitutional. See, Heublein, Inc. v. State, 256 Ga. 578 (351 SE2d 190) (1987).

EXHIBIT A

prospectively so that Beam is not entitled to a refund. We affirm.

1. The State appeals the trial court's decision that the pre-1985 version of OCGA §3-4-60 was unconstitutional. We find no error. The statute imposed higher taxes on out-of-state products solely because of their origin. The record demonstrates that the purpose and effect of the statute was simple economic protectionism, which is virtually per se invalid under the Commerce Clause of the U.S. Constitution. Id.

2. Beam asserts that the trial court erred in applying the decision prospectively only. We disagree. In Flewellen v. Atlanta Casualty Co., 250 Ga. 709 (300 SE2d 673) (1983), this Court adopted the three-pronged test set forth in Chevron Oil v. Huson, 404 U.S. 97 (92 SC 349, 30 LE2d 296) (1971), to be applied in deciding a retroactivity question:

> (1) Consider whether the decision to be applied nonretroactively established a new principle of law, either by overruling past precedent on which litigants relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

(2) Balance the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retroactive operation would further retard its operation.

(3) Weigh the inequity imposed by retroactive application, for, if a decision would produce substantial inequitable results if applied retroactively, there is ample basis for avoiding the injustice or hardship by a holding of nonretroactivity.

Flewellen, 250 Ga. at 712. Retroactive application of a judicial decision is not compelled constitutionally or otherwise[2] where unjust results would accrue to those who justifiably relied on the prior rule. Strickland v. Newton County, 244 Ga. 54 (258 SE2d 132) (1979) (decision holding local option sales tax should be applied prospectively to avoid unjust results).

Applying the first prong of the Chevron test, we note that the decision does not now establish a "new rule." However, if the decision had been rendered during 1984, the last year that

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[2]We are not persuaded by Beam's argument that OCGA §48-2-35(a) mandates retroactive application of the constitutional decision. The statute provides, "A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him..." The statute does not describe how it should be determined that a tax was "illegally assessed." It simply does not address the issue of retroactive versus prospective application of a constitutional decision.

paid in 1982, 1983 and 1984. There are at least two other lawsuits currently pending in which other alcohol producers seek over 28 million dollars in tax refunds on the same grounds. Economic realities lead to the inescapable conclusion that the cost of this tax has or could have been already absorbed by the companies and passed on to Georgia consumers. Indeed, retroactive application of the ruling might well result in a windfall to the alcohol producers.

On the other hand, if the decision is applied retroactively, Georgia faces liability for over 30 million dollars in refunds for taxes it collected in good faith under an unchallenged and presumptively valid statute. Georgia would have to refund large sums of money that it has already spent. Prospective application would avoid imposing a severe financial burden on the State and its citizens. In such situations, this Court and the courts of other states have frequently declined retroactive application, even though the ruling allows an unconstitutional statute to remain in effect for a limited period of time. See, Federated Mutual Ins. Co. v. DeKalb County, 255 Ga. 522 (341 SE2d 3) (1986); American Trucking Association v. Gray, 295 Ark. 43 (746 SW2d

377) (1988) (out-of-state truckers were not entitled to refund of taxes found violative of the Commerce Clause); National Distributing Co. v. Office of the Comptroller, 523 So.2d 156 (Fla. 1988) (prospective ruling appropriate where equities weighed against refund of taxes paid under alcoholic beverage statute); Metropolitan Life Ins. Co. v. Commissioner of Dept. of Insurance, 373 N.W.2d 399 (N.D. 1985) (no refund of taxes paid under statute giving unconstitutional preference to domestic insurance companies).

3. In 1939, this court upheld the precursor to the pre-1985 version of OCGA § 3-4-60 against a Commerce Clause challenge. Scott v. State, 187 Ga. 702 (1939), overruled on other grounds, Blackston v. Georgia Dep't of Natural Resources, 255 Ga. 15 (1985). Now, some fifty years later, we are striking down its successor because it violates the Commerce Clause.

As the dissent points out, there are a number of cases strongly supporting the argument that because the statute was unconstitutional, it was void ab initio. See, e.g., Dennison Mfg. Co. v. Wright, 156 Ga. 789 (1923); Battle v. Shivers, 39 Ga. 405 (1869).

However, the rule of voidness ab initio is not an absolute rule. It has exceptions.

> "The general rule is that an unconstitutional statute is wholly void and of no force and effect from the date it was enacted. This harsh rule is subject to exceptions, however, where, because of the nature of the statute and its previous application, unjust results would accrue to those who justifiably relied on it . . ."
>
> While we have declared statutes to be void from their inception when they were contrary to the Constitution at the time of enactment, . . . those decisions are not applicable to the present controversy, as the original . . . statute, when adopted, was not violative of the Constitution under court interpretations of that period.

Adams v. Adams, 249 Ga. 477, 478-79 (citations omitted) (quoting Strickland v. Newton County, 244 Ga. 54, 55 (1979) (citations omitted)). Other cases have held similarly. E.g. Strickland v. Newton County, 244 Ga. 54, 55 (1979); Allan v. Allan, 236 Ga. 199, 207-08 (1976). In all of these cases, the court has applied its decision prospectively rather than retroactively.

We apply the exception to the general rule. Here the state has collected taxes under this statute or its predecessors

over a half century in reliance on a decision of this court. Under these circumstances and the balancing factors discussed in division two, supra, we hold it would be unjust to declare the statute void ab initio.

In sum, we conclude that prospective application of the decision is appropriate. The decision of the trial court is affirmed in all respects.

Judgment affirmed. All the Justices concur, except Smith and Weltner, JJ., who dissent as to Divisions 2 and 3.

46642, 46681. JAMES B. BEAM DISTILLING COMPANY v. STATE OF GEORGIA et al. and vice versa.

SMITH, Justice, concurring in part and dissenting in part. The problem with this case is that it is too simple. All that is involved is a statute which has been declared unconstitutional, a constitutional provision which requires this Court to declare the unconstitutional statute void, and a statute which says taxes erroneously to illegally collected must be refunded. This case involves the state's illegal collection of taxes from a single, readily-identifiable party on the basis of an

unconstitutional statute. The majority has successfully avoided the clear mandate of the Georgia Constitution, Georgia case law, and the Georgia refund statute. The "complicated exceptions" which the majority pointed out only make the simplicity of this case more pronounced. In short, the majority opinion is an excellent example of the judiciary attacking the solid rock of established Georgia constitutional law and Georgia case law with a hoe and trying to convince everyone that it's a bulldozer.

TAXPAYER'S RIGHTS

By placing emphasis on the issue of whether the decision in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (104 SC 3049, 82 LE2d 200) (1984)[3] should be given a retroactive application, the majority disguises the real issue: Which is more important in

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[3]The Court in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 277 (104 SC 3049, 82 LE2d 200) (1984), declined to address the refund issue. It remanded the case to the Supreme Court of Hawaii to determine the refund issues "which are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce..." 468 US at 277. The Court did note, "It may be, for example, that given an unconstitutional discrimination, a full refund is mandated by state law." Note 14. Here the statute unconstitutionally discriminated against non-resident taxpayers and a full refund is mandated by state law.

Georgia--the state's right to protect the ill-gotten gains of the treasury or the taxpayer's right to relief after a clear violation of the taxpayer's constitutional rights? See Tatarowicz, Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause, 41 Tax Lawyer (Fall 1987).

The majority opinion concludes that the state's right to protect its treasury is more important; however, I believe that the right of the taxpayer is more important.[4] The majority found, and I agree, that "the purpose and effect of the statute was simple economic protectionism, which is virtually per se invalid under the Commerce Clause of the U. S. Constitution."

Thus, I concur in the part of the majority opinion that affirms the trial court's holding that the pre-amendment statute was unconstitutional; however, there are several separate and distinct statutory and constitutional issues involved in this case

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[4]As we celebrate this Fourth of July, we are reminded that one of the sparks which ignited the Revolutionary War was the abusive manner in which the colonists were being taxed by the King. Our forefathers fought and won independence from a King who extracted excessive taxes, and the Constitution was drafted to protect the people from such abuses.

that clearly distinguish it from the cases that have been cited by the majority.[5] Therefore, I strongly disagree with the majority's conclusion "that prospective application of the decision is appropriate."

DISCUSSION OF THE MAJORITY OPINION

1. This Court adopted the test for retroactive application of judicial decisions set forth in Chevron Oil in Flewellen v. Atlanta Casualty Co., 250 Ga. 709 (330 SE2d 673) (1983), but Flewellen did not declare a statute unconstitutional.[6]

The majority also states in division two: "Retroactive application of a judicial decision is not compelled constitutionally or otherwise where unjust results would accrue to those who

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[5]Only one Georgia case was cited by the majority in division two which allegedly supports its conclusion that "an unconstitutional statute [may] remain in effect for a limited period of time." This case, Federated Mutual Ins. Co. v. DeKalb County, 255 Ga. 522 (341 SE2d 3) (1986), dealt with a repeal of a statute or ordinance by implication. The constitutionality of the statute was not involved. The other cases cited were foreign, and the majority did not show that those states have constitutional provisions similar to Georgia's. Under our constitution a statute is either constitutional and valid or unconstitutional and void. The constitution does not mandate a holding of "partial voidness."

[6]The only issue in Flewellen involved the proper interpretation and application of state insurance statutes.

justifiably relied on the prior rule." As set out in division three of this dissent, there is no question of "retroactive application of a judicial decision" when a statute is declared unconstitutional in Georgia. Once a statute is declared unconstitutional it becomes the constitutional duty of the judiciary to declare the statute void.

2. The majority would have us believe an earlier unsuccessful constitutional challenge in Scott v. State. 187 Ga. 702 (2 SE2d 65) (1939), somehow negates the constitutional mandate requiring this Court to declare the unconstitutional statute void. There is nothing in the Georgia Constitution indicating that reliance upon earlier decisions of this Court in any way changes or modifies the mandate of the constitution to declare unconstitutional statutes void.

THE GEORGIA CONSTITUTIONAL MANDATE

3. Our constitution requires us to declare unconstitutional legislative acts void. Ga. Constitution 1983, Art.

I, Sec. II, Par. V.[7] That constitutional provision does not allow this Court to set a specific date upon which an unconstitutional statute becomes inoperative. It does not allow this Court to determine that a statute is just a little bit void. It does not allow this Court to ignore its clear mandate or the long line of Georgia cases that have upheld the constitutional mandate. Nor can this Court rely on United States Supreme Court decisions that are not on point and in which the Georgia Constitution was never discussed or considered. (See division 5 infra, discussion of Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (60 SC 317, 84 LE2d 329) (1940). Instead our constitution and case law require us to declare unconstitutional acts entirely void from their inception.

> An unconstitutional statute, though having the form, features, and name of law, is in reality no law. It is wholly void. In legal contemplation it is as inoperative as if it had never been passed. It has been declared that it is a misnomer to call such statute a law. Such a statute confers no authority upon any one, and affords protection to no one. Norton v. Shelby County, 118 U.S. 425 (6

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[7]Paragraph V of the 1983 Georgia constitution entitled "What acts void" states: "Legislative acts in violation of this Constitution or the Constitution of the United States are void, and the judiciary shall so declare them."

Sup. Ct. 1121, 30 L. ed. 178); Ex Parte Siebold, 100 U.S. 371, 376 (25 L. ed. 717); [Cits.]; McCants v. Layfield, 149 Ga. 238 (99 S. E. 877).

In Osborn v. Bank of the United States, 9 Wheat. 738 (6 L. ed. 204), Chief Justice Marshall declared that "it is an extravagant proposition that a void act can afford protection to the person who executes it." In Boston v. Cummins, 16 Ga. 102, 106 (60 Am. D. 717), this court declared that "The unconstitutional acts of the legislature, State and Federal, are not laws; and no court will execute them, having a proper sense of its own obligations and responsibilities." In Wellborn v. Estes, 70 Ga. 390 this court said: "Legislative acts in violation of the constitution of this State or of the United States are void." The constitution of this State declares that "Legislative acts in violation of this constitution or the constitution of the United States are void, and the judiciary shall so declare them." Proceedings under an unconstitutional statute had before such statute is judicially declared to be unconstitutional are void. Jordan v. Franklin, 131 Ga. 487 (52 S. E. 673); Worth County v. Crisp County, 139 Ga. 117 (3) (76 S. E. 747); James v. Blakely, 143 Ga. 117 (84 S.E. 431). (Emphasis supplied in part.)

Dennision Mfg. v. Wright, 156 Ga. 789, 797 (120 SE 120) (1923). See also State Highway Department v. H. G. Hastings Co., 187 Ga. 204, 215 (199 SE2d 793) (1938); Tarpley v. Carr, 204 Ga. 721, 727 (51 SE2d 638) (1949) (City officers were not de facto officers of office created under an unconstitutional charter); Franklin v. Harper, 205 Ga. 779, 784 (55 SE2d 221) (1949); Baggett v. Linder, 208 Ga. 590, 591 (68 SE2d 469) (1952); Milam v. Adams, 216 Ga. 440, 444 (117 SE2d 343) (1960); K. Gordon Murray Productions, Inc. v. Floyd, 217 Ga. 784, 787 (125 SE2d 207) (1962) (". . . the remedy provided in the ordinance is not even law if the petitioner's constitutional attack is sustained.") Dobson v. Brown, 225 Ga. 73, 76 (166 SE2d 22) (1969) ("Not even estoppel can legalize or vitalize that which the law declares unlawful and void."); and Mapp v. First

Georgia Bank, et al., 156 Ga. App. 380 (274 SE2d 765) (1980) (See note 7, infra.)[8]

Although Bacchus may have led this Court to conclude that the Georgia statute, in the present case was unconstitutional, it does not affect Art. I, Sec. II, Par. V. of the Georgia Constitution which provides that an unconstitutional statute is void from its inception. Once the statute was declared unconstitutional, it was as if no statute, case law, or public policy had ever been established. "The Constitution is irrepealable, and any law in violation of it is void--is null; rights cannot grow up under such a law." Battle v. Shivers, 39 Ga. 405, 416 (1869). Once the statute was declared unconstitutional it became inoperative, as if it had never been passed. Therefore, no court having a proper sense of its own obligations and responsibilities will execute it. Dennison, supra, 156 Ga. at 797. The state had no authority to assess or collect the taxes, and this Court has no authority to execute a void statute.

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[8]The law in this area has been so firmly established that few recent cases discuss the issue.

THERE ARE NO EQUITIES TO BALANCE

4. The majority's discussion of "balancing the equities," is misplaced. When a statute is declared unconstitutional, there can be no balancing of equities as none exist. "[W]e are bound to follow the laws of this state and the decisions of our Supreme Court even when . . . the resulting decision effects a hardship . . . ." Mapp v. First Georgia Bank, et al., 156 Ga. App. 380, 381 (274 SE2d 765) (1980).[9]

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[9]On May 26, 1976 appellant Mapp purchased an automobile from Ed Cook. The car had been purchased by Cook from Hopkins Chevrolet, Inc., which in turn has purchased the automobile from Timmers Chevrolet, Inc., pursuant to a sale under the Georgia Abandoned Motor Vehicle Act. On October 26, 1976, First Georgia Bank repossessed the automobile, claiming that it held a perfected security interest in the automobile which had been created at the time of the initial purchase by C. J. Wilson. Mapp filed suit against the Bank, alleging that the Bank had illegally converted the automobile. The trial court granted summary judgment in favor of the Bank, concluding that Mapp's title was invalid on the basis of a 1979 case which held the Georgia Abandoned Motor Vehicle Act to be unconstitutional. Since the sale was in accordance with an act which was later held to be unconstitutional, the sale passed no title. The Court of Appeals affirmed the trial court's ruling because an unconstitutional statute is a void statute from its inception and no rights accrue thereunder.

An even more astonishing discovery in reading Chicot is that Chicot cited Norton v. Shelby County the exact same case cited in Dennison, supra, (See division 3 of this dissent) for the proposition that an unconstitutional statute "confers no authority upon any one, and affords protection to no one." See division 3 of this dissent. The Allan opinion ignored the above language with its two citations to Supreme Court decisions and quoted dicta that was completely devoid of a citation to any decision of any court.[10]

In the three cases that represent the "exceptions," the Court in attempting to do equity, did not face the constitutional mandate head-on.

In Allan, Strickland, and Admas, there may have been other individuals who may have been harmed in the past, but they were, for all practical purposes, unascertainable. The amount of damage suffered by other individuals was also almost impossible to determine. In Allan and Adams there was also the

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[10]The language relied upon by Allan was totally unnecessary in adjudicating the Chict case. The respondents in Chicot failed to raise a constitutional issue in the courts below;

potential of disrupting years of quiet titles and confusing property law.

This case, on the other hand, involves one clearly-identified taxpayer who paid the state an ascertainable amount of money in illegal taxes over a specified period of time; therefore, there is no difficulty in determining to whom the taxes should be refunded and for what amount. In addition, such a refund would not disturb property law.

The "exceptions" are built upon a faulty unconstitutional foundation, and they should fall. They are court-made, but not constitutionally allowed.

THE CONSTITUTION IS THE WILL OF THE PEOPLE

7. The supreme power of this state is in the people and the written constitution is the will of the people. The people have decided that the judiciary must declare unconstitutional statutes void. By looking to dicta of United States Supreme Court decisions--in which our constitution was not at issue--this Court ignores the dictate of the people as set forth in the Georgia Constitution.

collected under state law. The statute includes taxes which are paid voluntarily and involuntarily, thus no element of duress is required nor must a protest be filed. The remedy statute is mandatory rather than directory, and it acts as a waiver of sovereign immunity. Thompson v. Continental Gin Co., 73 Ga. App. 694 (37 SE2d 819) (1946).

Since the General Assembly intended to allow refunds under many different circumstances, it is incomprehensible that the taxpayer in the present case who successfully challenged the constitutionality of the taxing statute is barred from recovery. The key words of the remedy statute are erroneously or illegally assessed and collected. The majority indicates that the state had "no reason to believe that the import taxes were unconstitutional"; however, under the broad language of the statute it makes no difference that the state erroneously assessed and collected taxes under the unconstitutional statute. Erroneously assessed and collected taxes must be returned. Once the taxing statute was declared unconstitutional and void, there was no legal collection of these taxes, nor had there ever been

one. Therefore, the state is illegally in possession of the taxpayer's property.

OTHER CONSTITUTIONAL PROVISIONS WHICH REQUIRE REPAYMENT

9. There are also constitutional provisions which require the return of unconstitutionally assessed and collected taxes. The state cannot deprive a person of property without due process of law. Georgia Constitution 1983, Art. I, Sec. I, Par. I. The due-process clause extends to every proceeding which may be a deprivation of "life, liberty, or property, whether the process be judicial or administrative or executive in its nature. [Cit.]" Zachos v. Huiet, 195 Ga. 780, 786 (25 SE2d 806) (1943). The assessment and collection of taxes in the absence of a valid taxing statute constitutes such an unconstitutional deprivation of property.

10. One of the paramount duties of government is to protect the property of its taxpayers. Georgia Constitution, 1983, Art. I, Sec. I, Par. II. "It is the duty of the State government, through the instrumentality of the courts, to protect the property of a citizen and his right to possess and control it." Irwin v.

Willis, 202 Ga. 463, 477 (43 S.E.2d 691) (1947). This Court must protect taxpayers who have had property erroneously or illegally taken under the auspices of an unconstitutional taxing statute by requiring the state to refund such illegally-collected taxes.[12]

The above constitutional provisions, all found in our Bill of Rights, were enacted to place limits on the government and to protect the people from governmental abuses. The government's authority to tax is powerful. In fact, in 1819 Chief Justice Marshall said:

> [That] the power to tax involves the power to destroy . . . . [is a] proposition[] not to be denied.

McCulloch v. Maryland, 4 Wheaton 316, 431 (1819).

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[12]An identical question is involved in Marcus Collins v. Waldron and all Retired Federal Employees Similarly situated, No. 47018 argued June 27, 1989. Retired federal employees challenged Georgia's scheme of taxation which taxes the retirement income of federal retirees while exempting the retirement income of state retirees as being unconstitutional. They argued, under the authority of Davis v. Michigan Department of Treasury, ___U.S. _____, 57 U.S. L.W. 4389 (March 28, 1989), that the Georgia scheme is unconstitutional and, therefore, the taxes were illegally collected.

If this Court does not treat the unconstitutional statute as void from its inception, then nothing will deter the state from enacting other unconstitutional statutes and reaping the benefits therefrom. The constitutional mandate to declare the statute void, Ga. Constitution, 1983, Art. I, Sec. II, Par. V, is the taxpayer's protection from the power of the sovereign "to destroy." McCollough, Id.

This Court has placed a great deal of emphasis on the fact that the taxpayer in this case is a liquor company. It does not matter who the taxpayer is--a liquor company or an illegally taxed individual--the taxpayer is entitled to protection under the laws of this state. As former Supreme Court Justice Hugo Black said:

> Good men and bad men are entitled to trial and sentence in accordance with the law.

CONCLUSION

The constitutional mandate requiring this Court to declare the statute void has been ignored. The state's expressed public policy to refund taxes is thwarted just as the remedy statute,

OCGA § 48-2-35, is trampled and, in reality, repealed by this Court. The majority's insistence upon declaring the statute void prospectively only,[13] while ignoring the Georgia Constitution, grants a hollow victory to the appellant who proved the taxing statute was unconstitutional. It also denies a remedy for the unlawful taking of the appellant's property, disregards the mandatory nature of the remedy statute, and sends the message to Georgia taxpayers that this Court will not protect their rights nor require the state to be accountable for taxes unconstitutionally and erroneously or illegally assessed and collected.

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[13]How can something be applied prospectively if it never existed? The doctrine of nonretroactivity may be used when dealing with a valid statute, law, case law, or a change in law or public policy. It does not apply and is not used in Georgia constitutional cases because the statute, case law, or public policy must, as required by our constitution and case law, be treated as if it never existed.

A BILL TO BE ENTITLED
AN ACT

To amend Title 3 of the Official Code of Georgia Annotated, relating to alcoholic beverages, so as to change certain excise taxes on distilled spirits, alcohol, table wines and dessert wines; to provide an effective date; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. Title 3 of the Official Code of Georgia Annotated, relating to alcoholic beverages, is amended by striking in its entirety Code Section 3-4-60, relating to the levy and amount of excise taxes on distilled spirits and alcohol, which reads as follows:

"3-4-60. The following state excise taxes are levied and imposed:

(1) On the importation of all distilled spirits imported into this state, a tax of $1.00 per liter and on all alcohol imported into this state, a tax of $1.40 per liter,

and a proportionate tax at the same rate on all fractional parts of a liter;

(2) On the manufacture of all distilled spirits manufactured in this state from Georgia-grown products, a tax of 50 cents per liter and on all alcohol manufactured in this state from Georgia-grown products, a tax of 70 cents per liter, and a proportionate tax at the same rate on all fractional parts of a liter."

and inserting in lieu thereof a new Code Section 3-4-60 to read as follows:

"3-4-60. The following state excise taxes are levied and imposed:

(1) On the importation of all distilled spirits imported into this state and on the manufacture of all distilled spirits manufactured in this state, a tax of $1.00 per liter and a proportionate tax at the same rate on all fractional parts of a liter;

(2) On the importation of all alcohol imported into this state and on the manufacture of all alcohol manufactured in this state, a tax of $1.40 per liter and a proportionate tax at the same rate on all fractional parts of liter."

Section 2. Said title is further amended by striking in its entirety Code Section 3-6-50, relating to the levy and amount of excise taxes on wines, which reads as follows:

"3-6-50. There is levied and imposed on the first sale, use, or possession of wines within this state the following taxes:

(1) On table wine produced within the state from at least 40 percent of fruits and berries grown within the state:

(A) Eleven cents per liter and a proportionate tax at like rates on all fractional parts of a liter on that portion that is produced from fruits and berries grown within the state: and

(B) Forty cents per liter and a proportionate tax on like rates on all fractional parts of a litemo that portion that is produced from fruits and berries grown outside the state:

(2) On table wines produced from fruits and berries grown outside the state, whether produced within or outside the state, 40 cents per liter and a proportionate tax at the same rate on all fractional parts of a liter;

(3) On dessert wines produced within the state, from at least 40 percent of fruits and berries grown within the state:

(A) Twenty-seven cents per liter and a proportionate tax at like rates on all fractional parts of a liter on that portion that is produced from fruits and berries grown within the state; and

(B) Sixty-seven cents per liter and a proportionate tax on like rates on all fractional parts of a liter on that portion that is produced from fruits and berries grown outside the state;

(4) On dessert wines produced within the state

wholly from fruits and berries grown within the state to which wine spirits produced outside the state have been added, 67 cents per liter and a proportionate tax at the same rate on all fractional parts of a liter; and

(5) On dessert wines produced from fruits and berries grown outside the state, whether produced within or outside the state, 67 cents per liter and a proportionate tax at the same rate on all fractional parts of a liter."

and inserting in lieu thereof a new Code Section 3-6-50 to read as follows:

"3-6-60. There is levied and imposed on the first sale, use, or possession of wines within this state the following taxes:

(1) On table wine, a tax of 40 cents per liter, and a proportionate tax at the same rate on all fractional parts of a liter;

(2) On dessert wines, a tax of 67 cents per liter, and a proportionate tax at the same rate on all fractional parts of a liter."

Section 3. This Act shall become effective upon its approval by the Governor or upon its becoming law without his approval.

Section 4. All laws and parts of laws in conflict with this Act are repealed.

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES B. BEAM DISTILLING CO., a Delaware Corporation,	§	
Plaintiff,	§	CIVIL ACTION
	§	FILE NO. D-42527
v.	§	
STATE OF GEORGIA, JOE FRANK HARRIS, Individually and as Governor of the State of Georgia, MARCUS E. COLLINS, Individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,	§	
Defendants.	§	

FINAL ORDER

This action came on for hearing on Cross Motions for Summary Judgment filed by plaintiff and defendants. The questions presented for resolution by the Court are whether O.C.G.A. § 3-4-60, as that statute existed and was applied in 1982, 1983 and 1984 (prior to its amendment in 1985) violated the Commerce Clause and the Equal Protection Clause of the

United States Constitution by discriminating against out-of-state producers of alcoholic beverages in order to promote the manufacture of alcoholic beverages and the local production of the component materials of alcoholic beverages within Georgia.

UNDISPUTED FACTS

The Court observes that there is no genuine dispute with respect to the following material facts:

1.

James B. Beam Distilling Co. (hereinafter "James Beam") is a Delaware corporation.

2.

James Beam is a producer and importer of alcoholic beverages.

3.

James Beam is engaged in business in interstate commerce throughout the United States.

4.

James Beam is permitted by federal and Georgia authorities to import alcoholic beverages.

5.

James Beam ships and sells alcoholic beverages produced outside the State of Georgia to licensed wholesalers doing business in the State of Georgia.

6.

Defendant Joe Frank Harris is the Governor of Georgia.

7.

Joe Frank Harris is the State Official who has authority, under O.C.G.A. § 48-2-35(a), to authorize a refund of taxes.

8.

Defendant Marcus E. Collins is the Georgia State Revenue Commissioner (hereinafter "Commissioner") and is the State official who is charged with the duty to administer and enforce the State's revenue laws, including the taxes imposed under O.C.G.A. § 3-4-60.

9.

Defendant Claude L. Vickers is the Director of the Fiscal Division of the Department of Administrative Services of the State of Georgia (hereinafter "Fiscal Division").

10.

The Commissioner is directed to remit to the Fiscal Division the taxes (and penalties, interest, and fees) collected under O.C.G.A. § 3-4-60.

11.

The jurisdiction of this Court is predicated upon, and venue in this Court is proper pursuant to, O.C.G.A. § 48-2-35(4)(A).

12.

As a condition to selling alcoholic beverages to Georgia wholesalers, James Beam, during the time period relevant to this action, was required under O.C.G.A. §§ 3-4-60 and 3-4-61 to pay the applicable state excise taxes by purchasing stamps in proper denominations denoting the payment of taxes and affixing such stamps to each bottle or container of alcoholic beverages.

13.

Pursuant to O.C.G.A. 48-2-35(a), a taxpayer shall be refunded any and all taxes which are determined to have been illegally assessed and collected from the taxpayer under the laws of the State of Georgia, whether paid voluntarily or involuntarily,

18.

Because the Refund Claim was not decided by the Commissioner or his delegate within one year from the date of filing, O.C.G.A. § 48-2-35(4) gave James Beam the right to bring an action for refund in this Court.

19.

Pursuant to O.C.G.A. § 48-2-35(5), this action is timely commenced.

20.

Under O.C.G.A. 3-4-60, as codified during the time period relevant to this action, locally produced distilled spirits are taxes at 50 cents per liter.

21.

Under O.C.G.A. 3-4-60, as codified during the time period relevant to this action, locally produced alcohol is taxed at 70 cents per liter.

22.

Under O.C.G.A. § 3-4-60, as codified during the time period relevant to this action, distilled spirits manufactured outside Georgia are taxed at $1.00 per liter.

23.

Under O.C.G.A. § 3-4-60, as codified during the time period relevant to this action, alcohol manufactured outside Georgia is taxed at $1.40 per liter.

24.

All alcoholic beverages covered by O.C.G.A. § 3-4-60, as codified during the time period relevant to this action, are taxed proportionately at the applicable rate on all fractional parts of a liter.

25.

No legislative history or other evidence is contained in the record to support the State's contention that O.C.G.A. § 3-4-60 was originally enacted with a disparity to cover the added cost of regulating this imported product.

26.

O.C.G.A. § 3-4-60 was enacted to encourage Georgia residents to grow products used to produce alcohol and distilled spirits.

CONCLUSIONS OF LAW

1.

O.C.G.A. § 3-4-60 was enacted exclusively for the benefit of Georgia grown products and Georgia manufacturers of alcohol.

2.

The disparity in taxation in O.C.G.A. § 3-4-60 was unrelated to the costs of regulation and enforcement.

3.

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984) provides that if either the purpose or effect of a state tax is to discriminate in favor of local businesses or goods, then the legislation may constitute "simple economic protectionism" and, if so, is virtually per se invalid. This Court holds that, as a matter of law, the effect of O.C.G.A. § 3-4-60 is discriminatory against alcoholic beverages produced outside the state of Georgia in that said beverages are taxed at twice the rate of beverages produced in Georgia from Georgia-grown products. The Twenty First Amendment to the United States Constitution permits the State to discriminate under certain now more clearly defined circumstances where interstate commerce of alcohol is involved.

"[O]nce a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available non-discriminatory means." Main v. Taylor, ____ U.S. ___, 106 S. Ct. 2440, 2448 (1986). This COurt holds that, in view of the facially discriminatory effect of the statute as it existed during the years in question, the burden to show a legitimate local purpose has fallen to the State. The defendants in this action have not met their burden to show a correlation between the higher tax on out-of-state alcoholic beverages and the contended additional costs involved in regulating such beverages, which the defendants claim to be the justification for the disparity.

5.

This Court further holds that the purpose of O.C.G.A. § 3-4-60, as it existed during the years in question, was economic protectionism, i.e., to benefit local business and local industry. This purpose is indicated by the legislative history, 1937-38 Ga.

Twenty First Amendment to the United States Constitution to the statute there under attack saved the State in light of record substantiating the necessity for a higher tax on distilled spirits produced outside Georgia. Such is not the case here. That case involved O.C.G.A. § 3-4-60 as amended in 1985 to alter the preferential taxing scheme by applying an add-on tax on the importation of alcoholic beverages manufactured outside the State of Georgia and the amount of the add-on tax was justified by the present additional expense necessary to regulate this industry. Here, the record before this Court concerning a statute in effect for 30 years, is silent as to any such need existing at the time of its enactment. Viewing the statute attacked here in light of Bacchus one clearly discerns that the original purpose of the 1938 Act was economic protectionism and the Commerce Clause has been violated notwithstanding the authority granted the States under the Twenty First Amendment. The State has shown, via Heublein, that there is a reasonable difference in the costs of administering control over imported and domestic alcoholic beverages. However, the State may not bootstrap its argument contending that this evidence somehow supplies a non violative

purpose for the 1938 Act.

7.

The contention that the statute in question violates the Equal Protection Clause of the Constitution is meritless. Like Heublein this case involves "purely economic matters that traditionally merit only the mildest review under the Fourteenth Amendment." Heublein Inc. v. State of Georgia, 256 Ga. 578, 585 (1987) (quoting Craig v. Boren, 429 U.S. 190, 207 (1976)). The stated purpose of the 1938 Act for "legalizing and controlling" the importation of alcoholic beverages supports a finding that the import tax is rationally related to a legitimate state objective of regulating the importation of alcohol pursuant to the Twenty First Amendment when tested by the requirements solely of equal protection. The disparity in taxes is inconsequential in an equal protection context.

8.

This Court holds that the statute in question, as it existed during the years of 1982, 1983 and 1984 was an unconstitutional infringement upon interstate commerce in violation of the Commerce Clause of the United States Constitution. However,

First, in the present action, the decision of this Court establishes a new principle of law by overruling a past statute on which defendants relied. See Strickland v. Newton County, 244 Ga. 54, 55 (1979); Ashland Oil Inc. v. Rose, 350 S.E.2d 531, 535 (W. Va. 1986). Second, it is unnecessary to address the retrospective operation of the decision of this Court by applying a "weighing of the merits" test since the offending statute was amended in 1985 to remove its Constitutional infirmities and no effort will be made hereafter to assert its validity by defendants. Lastly, the Court declines to apply this decision retroactively since it finds that here, as in a prior Georgia Supreme Court decision, "unjust results would accrue to those who justifiably relied on it." Strickland v. Newton County, 244 Ga. 54, 55 (1979); Preston Carroll Co. v. Morrison Co., 173 Ga. App. 412, 414, rev'd on other grounds, 254 Ga. 608 (1985).

ORDER

Based on the foregoing Findings and Conclusions, it is hereby ORDERED and ADJUDGED as follows:

1.

The Court having considered the entire record including all exhibits submitted hereby GRANTS the Motion for Summary Judgment filed by plaintiff James B. Beam Distilling Company to the extent that it seeks to declare unconstitutional O.C.G.A. § 3-4-60 and the Motion for Summary Judgment filed by defendants is accordingly DENIED.

2.

The Court having found that the test required by Chevron Oil Co. v. Huston has been met, hereby DIRECTS that this decision as it affects the imposition of taxes shall be applied prospectively. The Court hereby DIRECTS that the date of prospective application of this decision shall be the date of the enactment of the amendment to O.C.G.A. § 3-4-60 and shall apply only to tax liability of plaintiff, if any, as of the date the statute was enacted in its present form. Having concluded that this decision should not be applied retroactively so as to allow plaintiff to recover a refund under O.C.G.A. § 42-2-35(b)(1), and that this decision shall apply prospectively, plaintiff shall recover nothing. Further, the Court finds there is no just reason for

delay and DIRECTS that Judgment be entered.

SO ORDERED this 27th day of May, 1988.

/s/
RALPH H. HICKS, JUDGE
Fulton Superior Court
Atlanta Judicial Circuit

No. 89-680

In The

Supreme Court of the United States

October Term, 1989

JAMES B. BEAM DISTILLING CO.,

Petitioner,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether this Court should grant certiorari in order to decide this case along with *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, ___ U.S. ___, 109 S. Ct. 3238 (1989), despite the fact that this case bears no factual resemblance to *McKesson*.[1]

II. Whether this Court should grant certiorari to determine if "the denial of a refund of unconstitutionally collected taxes in and of itself amounts to an unconstitutional deprivation of property," where Petitioner failed to properly raise this argument at any point during the proceedings below.

III. Whether this Court should grant certiorari to determine if the Supreme Court of Georgia, in construing Georgia's tax statutes so as to preclude the refund of state taxes sought by Petitioner, properly applied Georgia law.

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[1] On July 3, 1989, this Court set *McKesson* for reargument and directed the parties to submit additional briefs on the following question: "When a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief?" In framing its Question Presented for Review, Petitioner contends that the identical issue is presented in this case. (Pet. for Writ of Certiorari, p. i.) In fact, as discussed below, Petitioner did not pay its taxes under protest; neither did Petitioner base its claim to a tax refund on federal constitutional principles, but instead relied solely on Georgia's tax refund statute.

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LAWS OF GEORGIA

No. 89-680

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents in the above-styled action respectfully oppose the Petition for Writ of Certiorari to the Supreme Court of Georgia. The question presented by Petitioner for review is inapposite to the disposition of this case, and none of the considerations outlined in Supreme Court Rule 17 governing review on certiorari are met. Accordingly, Respondents request that the Petition be denied.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Georgia is officially reported at 259 Ga. 363 (1989), and is unofficially reported at 382 S.E.2d 95 (1989). In addition, the text of the opinion is included as Exhibit A in the Petitioner's Appendix to Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

Respondents concur in the Petitioner's Statement of the Grounds on Which the Jurisdiction of this Court is Invoked.

STATUTORY PROVISION AT ISSUE

The statute at issue in this case is O.C.G.A. § 3-4-60 as it existed prior to its amendment in 1985. The text of O.C.G.A. § 3-4-60 as it then existed is included as Exhibit B in the Petitioner's Appendix to Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner, James B. Beam Distilling Company, brought this action challenging the constitutionality of O.C.G.A. § 3-4-60, as codified in 1982, 1983 and 1984 (hereinafter "the claim period"), and, pursuant to O.C.G.A. § 48-2-35(a), claimed a refund of $2,400,000 for taxes paid under the now repealed statute. As codified during the claim period, O.C.G.A. § 3-4-60 imposed taxes

on all alcoholic beverages manufactured in or imported into Georgia. Under the provisions of the statute, alcoholic beverages imported into the State by either in-state or out-of-state producers or manufacturers were subject to a higher tax than alcoholic beverages manufactured in Georgia. 1981 Ga. Laws 1269, § 35; O.C.G.A. § 3-4-60 (Michie 1982).

A tax structure similar to that embodied by O.C.G.A. § 3-4-60 had been in effect in Georgia since 1938. The original legislation imposing taxes on alcoholic beverages manufactured and imported into Georgia was enacted in 1938 as Section 11 of the "Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors" (hereinafter the "1938 Act"). 1937-38 Ga. Laws (Ex. Sess.) 103.

Enacted not long after the end of Prohibition and the adoption of the Twenty-first Amendment, the 1938 Act was intended to provide for the "taxation, legalization, control, manufacture, importation, distribution, sale and storage of alcoholic beverages." 1937-38 Ga. Laws (Ex. Sess.) 103. Under Section 11 of the Act, alcoholic beverages manufactured from out-of-state products were subject to a higher tax than alcoholic beverages manufactured from Georgia-grown products.

Shortly after its enactment, Section 11 of the 1938 Act was challenged on the grounds that it violated the Commerce Clause of the Constitution of the United States. In *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939), *overruled on other grounds, Blackston v. Georgia Department of Natural Resources*, 255 Ga. 15, 334 S.E.2d 679 (1985), the Georgia Supreme Court upheld the constitutionality of Section 11.

Since 1938, the tax system created by Section 11 of the 1938 Act has been amended several times to revise rates and effect other minor changes. The most recent amendment was in 1985, which amendment, in response to this Court's ruling in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), repealed the statute at issue in this case. The 1985 Amendment also imposed a direct tax on the importation of alcoholic beverages into Georgia. 1985 Ga. Laws 665; O.C.G.A. § 3-4-60 (Michie 1988 Supp.).

In April of 1985, the 1985 Amendment was challenged on Equal Protection and Commerce Clause grounds. The Georgia Supreme Court, as it had in *Scott*, upheld the constitutionality of the tax structure, finding that it did not violate the Commerce Clause. *Heublein, Inc. v. Georgia*, 256 Ga. 578, 351 S.E.2d 190, *appeal dismissed*, 483 U.S. 1013 (1987). This Court declined further review of the Georgia Supreme Court's decision; the post-*Bacchus* amendment is not at issue in this case.

Also in April of 1985, the Petitioner filed a claim with the Georgia Revenue Department for a refund of taxes allegedly paid pursuant to O.C.G.A. § 3-4-60, as the statute existed during 1982, 1983 and 1984, challenging the constitutionality of the statute which was by then repealed. On April 24, 1987, the Petitioner filed this tax refund action pursuant to O.C.G.A. § 48-2-35(a). In its Complaint, the Petitioner challenged O.C.G.A. § 3-4-60, as codified during the claim period, on the grounds that its tax provisions related to alcoholic beverages manufactured outside of Georgia violated the Commerce Clause and the Equal Protection Clause of the United States Constitution.

This matter came before the trial court on cross motions for summary judgment. After hearing these motions, the Superior Court of Fulton County, on May 27, 1988, entered an order holding O.C.G.A. § 3-4-60, as codified during the claim period, unconstitutional under the Commerce Clause. However, the trial court directed that its decision on the statute's constitutionality apply prospectively only, and that Petitioner therefore recover nothing on its claim for refund of the taxes paid in the past.

Petitioner appealed the trial court's "prospectivity" holding to the Supreme Court of Georgia, urging that Georgia's refund statute required a refund as a matter of state law. The Georgia Supreme Court, in a decision dated July 14, 1989, ruled that the Georgia refund statute did not mandate a refund, and that the trial court correctly interpreted Georgia law in applying its decision prospectively. The court denied Petitioner's Motion for Rehearing on July 26, 1989. Petitioner thereafter filed the instant Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

This petition arose as a result of Petitioner's claim that it was entitled to a refund, pursuant to O.C.G.A. § 48-2-35, of taxes it paid on alcoholic beverages between 1982 and 1984. Having failed to persuade the Georgia courts that Georgia's law mandates a refund of the taxes paid, Petitioner now asserts for the first time on appeal that a vague and undefined federal refund remedy must accompany any finding that a previously repealed state

tax statute was unconstitutional. In so arguing, Petitioner relies entirely on alleged similarities between this case and *McKesson*. In fact, the *McKesson* petitioners seek a refund of taxes paid, *under protest*, to the State of Florida *after* the Florida legislature amended the state's taxing statutes in response to this Court's decision in *Bacchus*. Since the Georgia Supreme Court's decision regarding the construction of Georgia law is not appropriately reviewable by this Court, and since Petitioner cannot for the first time on appeal raise an issue that was not asserted before, or considered by, the courts below, the Petition for Writ of Certiorari should be denied.

ARGUMENT

I. THIS COURT SHOULD NOT GRANT CERTIORARI IN ORDER TO DECIDE THIS CASE ALONG WITH *McKESSON CORP. V. DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO*, ___ U.S. ___, 109 S. Ct. 3238 (1989), SINCE THIS CASE BEARS NO FACTUAL RESEMBLANCE AT ALL TO *McKESSON*.

Petitioner's attempt to liken the issues in this case with those before the Court in *McKesson* is nothing less than misleading. In framing its Question Presented, Petitioner has egregiously misrepresented the facts of this case by stating that the taxes at issue here were paid "under protest." In fact, the taxes complained of went unchallenged in any way until April of 1985, when Petitioner filed its claim for refund. *See* Order of Superior Court, ¶14, contained in Petitioner's Appendix as Exhibit C.

In essence, the *McKesson* petitioners argue that Florida erred in its legislative response to *Bacchus*, and that they are entitled to protection where they paid, under protest, taxes they believed to be unconstitutional. Alcoholic beverage manufacturers in Georgia also paid taxes under protest while attacking the constitutionality of Georgia's legislative response to *Bacchus*, but their challenge was unsuccessful. *See Heublein, Inc. v. State of Georgia*, 256 Ga. 578, 351 S.E.2d 190, *appeal dismissed*, 483 U.S. 1013 (1987). Petitioner here, however, unlike the taxpayers in *McKesson*, is seeking refunds based on a finding that Georgia's pre-*Bacchus* taxing structure was unconstitutional. As discussed above, the pre-*Bacchus* taxes at issue here were not paid under protest, and were collected in good faith for almost 50 years. Accordingly, this case is dissimilar in all pertinent respects to *McKesson*, and does not warrant further review.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE WHETHER "THE DENIAL OF A REFUND OF UNCONSTITUTIONALLY COLLECTED TAXES IN AND OF ITSELF AMOUNTS TO AN UNCONSTITUTIONAL DEPRIVATION OF PROPERTY," WHERE PETITIONER FAILED TO PROPERLY RAISE THIS ARGUMENT AT ANY POINT DURING THE PROCEEDINGS BELOW.

For the first time on appeal, and in an attempt to equate this case to *McKesson*, Petitioner urges that it has a "federal constitutional right to a refund of taxes assessed in violation of the Commerce Clause." Petition, p. 9. This assertion, however, flies in the face of Petitioner's own

Complaint, wherein the claim for relief was based not on a "federal constitutional right to a refund," but on Georgia's refund statute. Under the circumstances, Petitioner may not now be heard to make arguments heretofore unknown to the record, and unreviewed by the courts below. *See Beck v. Washington*, 369 U.S. 541, 550-54 (1962) (assuming a federal question has been properly framed, it is essential that it be raised, presented, and pursued in a timely and proper manner at the appropriate point or points in the state court proceedings). *See also Hill v. California*, 401 U.S. 797, 805 (1971), *citing Cardinal v. Louisiana*, 394 U.S. 437, 438 (1969) (a federal claim cannot be considered by the Court unless it has been either raised in the state court or considered and resolved by the state court).

III. THIS COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE WHETHER THE SUPREME COURT OF GEORGIA, IN CONSTRUING GEORGIA'S TAX STATUTES SO AS TO PRECLUDE THE REFUND OF STATE TAXES SOUGHT BY PETITIONER, PROPERLY APPLIED GEORGIA LAW.

The Georgia Supreme Court held that state taxes are not "illegally assessed," within the meaning of Georgia's statute authorizing refunds of such payments, when collected under a statute later held unconstitutional in a judicial decision properly given prospective effect only. This decision, an interpretation of state law by the highest court in the state, is, in the absence of a properly presented claim or remedy based on federal law, not reviewable in this Court. *See, e.g., Kingsley Pictures Corp.*

v. Regents, 360 U.S. 684, 688 (1959); *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509, 512-513 (1933).

In considering Petitioner's novel argument that the Georgia refund statute mandates a refund under the circumstances of this case, the Georgia Supreme Court pointed out that nothing in the statute required a "retroactive application of the constitutional decision." 259 Ga. 363, 364 n.2, 382 S.E.2d 95, 96 n.2 (1989). Instead, the court applied the balancing test which this Court set forth in *Chevron Oil v. Huson*, 404 U.S. 97 (1971) and which the Georgia Supreme Court adopted itself in *Flewellen v. Atlanta Casualty Co.*, 250 Ga. 709, 300 S.E.2d 673 (1983). Under the *Chevron* line of cases, a court deciding whether to apply its decision prospectively should:

> (1) Consider whether the decision to be applied nonretroactively established a new principle of law, either by overruling past precedent on which litigants relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.
>
> (2) Balance the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retroactive operation would further retard its operation.
>
> (3) Weigh the inequity imposed by retroactive application, for, if a decision would produce substantial inequitable results if applied retroactively, there is ample basis for avoiding the injustice or hardship by a holding of nonretroactivity.

James Beam Distilling Co., 259 Ga. at 364, 382 S.E.2d at 96, *quoting Flewellen v. Atlanta Casualty Co.*, 250 Ga. at 712, 300 S.E.2d at 676.

The Georgia Supreme Court noted, with respect to the first prong of the *Chevron* test, that the tax structure attacked by Petitioner existed without challenge from 1939 – when the court expressly approved the constitutionality of the law – until 1985, when it was amended to comport with the principles set down in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). After so noting, the court expressly found that:

> During the time that the taxes at issue here were collected, the State had no reason to believe that the import taxes were unconstitutional. Moreover, when it became clear that there might be constitutional problems with the statute, see *Bacchus*, supra, the legislature moved promptly to amend the statute to rectify the defects. Thus, it appears that the first prong of the *Chevron* test favors prospective application of the rule.

259 Ga. at 365, 382 S.E.2d at 96.

The court concluded that the *Chevron* test's second prong had no application in this context since the statute at issue was repealed in 1985, prior to the filing of Petitioner's lawsuit. *Id.*

Finally, in applying the third prong, the court weighed the equities in awarding over 30 million dollars in refunds for amounts collected by the State in good faith under its unchallenged and presumptively valid tax statute, where the taxpayers themselves in all likelihood passed these costs on to their Georgia consumers.

> In such situations, this Court and the courts of other states have frequently declined retroactive application, even though the ruling allows an unconstitutional statute to remain in effect for a limited period of time. *See, Federated Mutual Ins.*

> *Co. v. Dekalb County*, 255 Ga. 522 (341 S.E.2d 3) (1986); *American Trucking Association v. Gray*, 295 Ark. 43 (746 S.W.2d 377) (1988) (out-of-state truckers were not entitled to refund of taxes found violative of the Commerce Clause); *National Distributing Co. v. Office of the Comptroller*, 523 So.2d 156 (Fla. 1988) (prospective ruling appropriate where equities weighed against refund of taxes paid under alcoholic beverage statute); *Metropolitan Life Ins. Co. v. Commissioner of Dept. of Insurance*, 373 N.W.2d 399 (N.D. 1985) (no refund of taxes paid under statute giving unconstitutional preference to domestic insurance companies).

259 Ga. at 365-66, 382 S.E.2d at 97.

Based on the balancing test discussed above, and after again noting the State's reliance on a decision of the Georgia Supreme Court approving the tax structure in question over 50 years before, the court determined that prospective application of the trial court's decision was appropriate, and rejected as unpersuasive Petitioner's reading of O.C.G.A. § 48-2-35(a). Further review of this decision construing state law would be inappropriate.

CONCLUSION

The issue presented by this case involves only the interpretation of state laws. Accordingly, and based on the arguments presented herein, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 89-680

In The

Supreme Court of the United States

October Term, 1989

JAMES B. BEAM DISTILLING CO.,
Petitioner,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE I. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,
Respondents.

On Petition for Certiorari
to the Supreme Court of Georgia

PETITIONER'S REPLY BRIEF

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Respondents.

On Petition for Certiorari
to the Supreme Court of Georgia

PETITIONER'S REPLY BRIEF

Petitioner JAMES B. BEAM DISTILLING CO. respectfully submits this Reply Brief to the Brief in Opposition by Respondents State of Georgia, Joe Frank Harris, Marcus E. Collins and Claude L. Vickers to the Petition for Writ of Certiorari to the Supreme Court of Georgia.

I. INTRODUCTION

In *James B. Beam Distilling Co. v. State of Georgia*, 259 Ga. 363, 382 S.E. 2d 95 (1989) (hereinafter "*Beam*"), the Georgia Supreme Court upheld the trial court's ruling holding former section 3-4-60 of the Official Code of

Georgia Annotated to be unconstitutional in violation of the Commerce Clause of the United States Constitution. Section 3-4-60, which has since been superseded, granted preferential taxing treatment to alcoholic beverages manufactured from Georgia-grown products. The issue before this Court on Petition for Certiorari is whether the trial court and Georgia Supreme Court properly applied their decisions prospectively only, so as to deny Petitioner a refund of the taxes paid pursuant to the offending statute in 1982, 1983 and 1984.

Respondents contend that the Petition for Grant of Certiorari of James B. Beam Distilling Co. ("Beam") should be denied because the Petition raises a federal claim (Due Process under the Fourteenth Amendment) that had not been considered by the State court(s). Brief of Respondents at p. 8. Respondents also dispute Beam's claim that this case is factually indistinguishable from *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, ___ U.S. ___, 109 S.Ct. 3238 (1989), *former decision*, 109 S.Ct. 389 (1988), *case below*, 524 So.2d 1000 (1988), and thus should be considered and decided along with *McKesson*. Brief of Respondents at pp. 6-7.

II. A FEDERAL QUESTION WAS PROPERLY RAISED AND PASSED UPON BY THE STATE COURTS

Without doubt, Beam paid taxes in the amount of $2.4 million pursuant to an unconstitutional statute. Both the trial court and the Georgia Supreme Court reached and agreed upon that conclusion without difficulty. The

Georgia Supreme Court disposed of that issue in one paragraph in its July 14, 1989 ruling:

> The State appeals the trial court's decision that the pre-1985 version of O.C.G.A. § 3-4-60 was unconstitutional. We find no error. The statute imposed higher taxes on out-of-state products solely because of their origin. The record demonstrates that the purpose and effect of the statute was simple economic protectionism, which is virtually per se invalid under the commerce clause of the U.S. Constitution. *Id.*

Beam, 259 Ga. at 364, 382 S.E. 2d at 96 (citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049 (1984)).

In *Bacchus* this Court held that a statute nearly identical in its operation to O.C.G.A. § 3-4-60 (Appendix, Exhibit "B") constituted simple economic protectionism in violation of the Commerce Clause by discriminating in favor of locally grown products. The rulings of the trial court and the Georgia Supreme Court were mandated by *Bacchus* and its antecedents. Thus, the critical issue before the trial court and the Georgia Supreme Court was whether to apply the *Bacchus* decision retroactively so as to grant a refund of the taxes paid under the unconstitutional statute, or prospectively only so as to protect the state treasury. *See American Trucking Associations, Inc. v. Gray*, 295 Ark. 43, 746 S.W.2d 377, 378 (1988), *cert. granted*, ___ U.S. ___, 109 S.Ct. 389 (1988) (where state statute held void by state court pursuant to decision of U.S. Supreme Court, issue is whether to apply *Supreme Court* ruling retroactively).

Whether to apply retroactively a decision of the United States Supreme Court constitutes a federal question. This Court may declare whether its decisions are to

be given retroactive or prospective application. The guidelines for making a determination as to whether decisions are to be given retroactive effect were established by this Court in *Chevron Oil Company v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971). In the instant case, the Georgia Supreme Court acknowledged that its determination of the retroactivity issue was governed by *Chevron* and purported to apply the criteria set forth therein. *See generally Beam*, 259 Ga. at 364-65, 382 S.E. 2d at 96-97.

In *Bacchus*, this Court expressed its federal constitutional interest in the retroactive versus prospective application of its decision, but reserved judgment on that issue:

> These refund issues, which are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce, were not addressed by the state courts [and therefore not properly before the Court]. Also, the federal constitutional issues involved may well be intertwined with, or their consideration obviated by, issues of state law.

Bacchus, 468 U.S. at 277, 104 S.Ct. at 3058 (footnote omitted). Here, "these refund issues" *were* raised and expressly passed upon in the Georgia state courts. The applicability of *Chevron* was raised, fully considered and passed upon both by the trial court and the Georgia Supreme Court. *See* Final Order of the trial court, Appendix, Exhibit C, at ¶ 9, Conclusions of Law, and *Beam*, 259 Ga. at 364-65, 382 S.E.2d at 96-97.[1]

---

[1] The Georgia Supreme Court in applying *Chevron* asserted that "courts . . . have frequently declined retroactive

(Continued on following page)

In *Bacchus* this Court noted that "[i]t may be . . . that . . . a full refund is mandated by state law," rendering moot the federal constitutional issues involved in the grant or denial of a refund. 468 U.S. at 277, n. 14; 104 S.Ct. at 3058, n. 14. Since in this case state law was determined *not* to mandate a refund, the "federal constitutional issues involved" concern the retroactive application of *Bacchus*, which Beam has called a Due Process issue. Regardless of how it is framed, the issue is clearly and properly before this Court.

III. THE ISSUES PRESENTED IN THIS CASE ARE IN FACT IDENTICAL, FOR ALL PRACTICAL PURPOSES, TO THOSE PRESENTED TO THE COURT IN *MCKESSON* AND ITS COMPANION CASE, *AMERICAN TRUCKING ASSOCIATIONS, INC. V. SMITH.*

A. Whether the Taxes Were Paid "Under Protest" Is Not Controlling.

Respondents contend that Beam has "egregiously misrepresented the facts of this case by stating that the

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(Continued from previous page)

application, even though the ruling allows an unconstitutional statute to remain in effect for a limited period of time." *Beam*, 259 Ga. at 365, 382 S.E.2d at 97. However, one of the cases cited by the Georgia Supreme Court in support of this proposition, *American Trucking Association v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988), is being considered by this Court in conjunction with *McKesson* on the very issue of retroactivity. *See American Trucking Associations, Inc. v. Smith*, ___ U.S. ___, 109 S.Ct. 3238 (1989), *former decisions*, 483 U.S. 1014, 107 S.Ct. 3252 (1987); 109 S.Ct. 389 (1988); 109 S.Ct. 1110 (1989), *case below, American Trucking Associations v. Gray, supra*, at p. 3.

taxes at issue here were paid 'under protest'." Brief of Respondents at p. 6. In its Question Presented for Review in its initial Brief, Beam tracked the language of this Court when it framed the issues for reargument in *McKesson* and *American Trucking Associations, Inc. v. Smith, supra*, at pp. 4-5, n.1 (hereinafter "*Smith*"). This is because of the virtually identical factual scenarios, particularly with respect to *McKesson*. However, any inference that the taxes paid in this particular case were paid under protest was purely inadvertent and at no time did Beam represent in the factual summary of this case that Beam had paid the taxes under protest. Furthermore, any confusion generated can hardly be termed "egregious." There is nothing in either *McKesson* or *Smith* to indicate that whether the taxes were paid under protest is any way critical to this Court's consideration of the issues presented in those cases.

B. *McKesson* is Indistinguishable from This Case as Concerns the Controlling Facts.

McKesson, when considered in light of its companion case, *Smith*, is on all fours with the facts of this case. *McKesson* involved a Florida statute granting tax preferred treatment to alcoholic beverages made from locally grown crops. As in Georgia, the Florida legislature, in the wake of *Bacchus*, amended the relevant statutory provisions to comply with that decision. However, the Florida amendments still granted "exemptions or tax preferences to wines and distilled spirits manufactured from citrus, with sugar cane, and certain grape species, all of which will grow in Florida, or from by-products or concentrates thereof, no matter where the point of manufacture . . ."

Division of Alcoholic Beverages & Tobacco v. McKesson Corp., 524 So.2d 1000, 1002 (1988). The trial court found that the amended statutory provision failed to correct the constitutional deficiencies highlighted in *Bacchus*, and held the amended provisions unconstitutional in violation of the Commerce Clause. However, the trial court gave only prospective application to its ruling and denied a refund of the taxes paid under the amended provisions.

The Florida Supreme Court upheld both rulings of the trial court. The Florida court refused to apply *Bacchus* retroactively on the basis that the taxing scheme in question was implemented "in good faith reliance on a presumptively valid statute . . . ," and "if given a refund, cross-appellants would in all probability receive a windfall, since the cost of the tax has likely been passed on to their customers." Similarly, in the instant case, the Georgia Supreme Court held "retroactive application of the ruling might well result in a windfall to the alcohol producers." *Beam*, 259 Ga. at 365, 382 S.E.2d at 97. Thus, a comparison of the two cases reveals not only factual similarity but identical legal reasoning.

Respondent's argument at pages 6-7 of their Brief that *McKesson* is distinguishable because if involves a post-*Bacchus* statute is unpersuasive. In *McKesson*, as in this case, the issue is whether a taxpayer is entitled to a refund of taxes paid pursuant to an unconstitutional taxing scheme.

American Trucking Association, Inc. v. Gray ("Gray"), supra at p. 3, is the decision appealed from in *Smith*. The refund issue in *Smith* was framed by this Court using the identical language as in *McKesson*. *See* ___ U.S. at ___, 109

S.Ct. at 3238. The 1983 state statute declared unconstitutional under the Commerce Clause in *Gray* was voided pursuant to a United States Supreme Court decision (*American Trucking Associations, Inc. v. Scheiner*, ___ U.S. ___, 107 S.Ct. 2829 (1987)) handed down four years after the statute was promulgated. As in this case, refunds were sought for taxes paid under the statute during the years *prior* to the controlling decision. Thus, that the statute involved in the instant case pre-dated *Bacchus* clearly does not control whether the refund issue is to be considered by this Court.

IV. CONCLUSION

Petitioner's Request for Review should be granted.

Dated: December 11, 1989

Respectfully submitted,

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No. 89-680

In The

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October Term, 1989

JAMES B. BEAM DISTILLING CO.,

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Respondents.

On Writ Of Certiorari To The Supreme Court Of Georgia

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Petition for Certiorari filed October 16, 1989
Certiorari granted June 11, 1990

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

April 24, 1987 – Complaint filed in the Superior Court of Fulton County, State of Georgia.

May 26, 1987 – Answer filed in the Superior Court of Fulton County, State of Georgia.

May 27, 1988 – Final Order issued by the Superior Court of Fulton County, State of Georgia, per Judge Ralph Hicks.

June 16, 1988 – Notice of Appeal filed by Plaintiff with the Superior Court of Fulton County, State of Georgia.

July 14, 1988 – Amended Notice of Appeal filed with the Superior Court of Fulton County, State of Georgia.

July 14, 1989 – Decision issued by the Supreme Court of Georgia affirming the Trial Court's ruling on the issue of prospective v. retroactive application.

July 24, 1989 – Motion for Reconsideration filed in the Supreme Court of Georgia.

July 26, 1989 – Order Denying Appellant James B. Beam Distilling Co.'s Motion for Reconsideration.

October 16, 1989 – Petition for Writ of Certiorari filed.

June 11, 1990 – Petition for Writ of Certiorari granted.

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES B. BEAM DISTILLING CO., a Delaware corporation, Plaintiff,	)	
v.	)	CIVIL ACTION FILE NO. D-42527 B16-264
STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,	)	
Defendants.	)	

COMPLAINT FOR REFUND OF TAXES
ILLEGALLY ASSESSED AND COLLECTED

The Plaintiff, by its attorneys, for its Complaint for refund of taxes illegally assessed and collected, alleges as follows:

PARTIES

1.

The Plaintiff, James B. Beam Distilling Co. (hereinafter "James Beam"), a Delaware corporation, is a producer and importer of alcoholic beverages and is engaged in business in interstate commerce throughout the United States. James Beam is permitted by federal and State authorities to import alcoholic beverages. James Beam

ships and sells alcoholic beverages produced outside the State of Georgia to licensed wholesalers doing business in the State of Georgia.

2.

Defendants are the State of Georgia and the State officials responsible for implementing, collecting, and administering the taxes that this refund action concerns.

3.

Defendant Joe Frank Harris is the Governor of Georgia and is responsible for enforcing its law. He is the State official who has authority, under Official Code of Ga. Ann. § 48-2-35(a), to authorize a refund of taxes.

4.

Defendant Marcus E. Collins is the Georgia State Revenue Commissioner (the "Commissioner") and is the State official who is charged with the duty to administer and enforce the State's revenue laws, including the taxes imposed under Official Code of Ga. Ann. § 3-4-60, which this refund action concerns.

5.

Defendant Claude L. Vickers is Director of the Fiscal Division of the Department of Administrative Services of the State of Georgia. The Commissioner is directed to

remit to the Fiscal Division the taxes (and penalties, interest, and fees) collected under Official Code of Ga. Ann. § 3-4-60.

6.

Because this action alleges Official Code of Ga. Ann. § 3-4-60 to be unconstitutional, the Attorney General of the State shall be served with a copy of this proceeding.

JURISDICTION AND VENUE

7.

The jurisdiction of this Court is predicated upon, and venue in this Court is proper pursuant to, Official Code of Ga. Ann. § 48-2-35(4)(A).

FACTUAL AND LEGAL BACKGROUND

8.

As a condition to selling alcoholic beverages to Georgia wholesalers, James Beam, during the time period relevant to this action, was required under Official Code of Ga. Ann. §§ 3-4-60 and 3-4-61 to pay the applicable State excise taxes by purchasing stamps in proper denominations denoting the payment of taxes and affixing such stamps to each bottle or container of alcoholic beverages.

9.

Official Code of Ga. Ann. § 3-4-60, as codified during the time period relevant to this action, on its face and as

applied constitutes an unlawful burden on interstate commerce in violation of the Commerce Clause, article I, section 8, clause 3 of the United States Constitution, because the State by its tax scheme favors domestic enterprises over businesses from other states.

10.

Official Code of Ga. Ann. § 3-4-60 discriminates against interstate commerce in violation of the Commerce Clause and the principle of *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), because it has both the purpose and effect of discriminating in favor of local products by providing a direct commercial advantage to local enterprises, and is not supported by any clear concern of the Twenty-first Amendment to the United States Constitution.

11.

Official Code of Ga. Ann. § 3-4-60, as codified during the time period relevant to this action, imposes on alcoholic beverages not manufactured within Georgia a substantially greater tax than on domestic products. On its face, and as applied to James Beam, the statute discriminates in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

12.

The arbitrary distinction in Official Code of Ga. Ann. § 3-4-60 between domestic and foreign products and

enterprises is not rationally related to any legitimate State purpose. The statute is completely discriminatory, favoring domestic enterprises by taxing foreign enterprises at substantially higher rates solely because of their residence, thus the statute violates the Equal Protection Clause and the principle of *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985).

CLAIM FOR REFUND

13.

In 1982, James Beam paid taxes under Official Code of Ga. Ann. § 3-4-60 in the amount $649,000.00.

14.

In 1983, James Beam paid taxes under Official Code of Ga. Ann. § 3-4-60 in the amount $857,000.00.

15.

In 1984, James Beam paid taxes under Official Code of Ga. Ann. § 3-4-60 in the amount $894,000.00.

16.

Thus, from 1982 to 1984, James Beam paid taxes under Official Code of Ga. Ann. § 3-4-60 in the total amount $2,400,000.00, all of which were illegally assessed and collected from James Beam.

17.

Pursuant to Official Code of Ga. Ann. § 48-2-35(a), a taxpayer shall be refunded any and all taxes which are determined to have been illegally assessed and collected from the taxpayer under the laws of this State, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes at the rate of 9% per annum from the date of payment of the tax to the Commissioner.

18.

Pursuant to Official Code of Ga. Ann. § 48-2-35(b)(1), James Beam timely made a claim for refund of the taxes illegally assessed and collected from James Beam during 1982 through 1984 under Official Code of Ga. Ann. § 3-4-60. An accurate facsimile of James Beam's claim filed in writing on or about April 25, 1985, in the form and containing such information as required, is attached hereto as Exhibit "A."

19.

In its claim for refund, James Beam requested a conference or hearing before the Commissioner in connection with the claim, however the Commissioner failed to grant a conference as required.

20.

James Beam's claim for refund has not been decided by the Commissioner or his delegate within one year from the date of filing the claim, thus Official Code of Ga.

Ann. § 48-2-35(4) gives James Beam the right to bring this action for refund.

21.

Pursuant to Official Code of Ga. Ann. § 48-2-35(5), this action is timely commenced.

PRAYER FOR RELIEF

WHEREFORE, James Bean prays:

(1) that this Court grant a refund of $2,400,000.00 for the taxes illegally assessed and collected from James Beam during 1982 through 1984 under Official Code of Ga. Ann. § 3-4-60, with interest;

(2) that the Court direct Defendants to take any and all action necessary to draw a refund from the State Treasury to James Beam in the amount prayed;

(3) that the Court award James Beam its attorneys' fees and the costs of this action; and

(4) that the Court grant James Beam such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ John L. Taylor, Jr.
Attorney For Plaintiff
James B. Beam Distilling Co.

Morton Siegel
Michael A. Moses
Richard G. Schoenstadt
James L. Webster

SIEGEL, MOSES & SCHOENSTADT
10 East Huron Street
Chicago, Illinois 60611

John L. Taylor, Jr.
John J. Schaub

CHOREY, TAYLOR & FEIL
A Professional Corporation
500 Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303

Attorneys for Plaintiff
James B. Beam Distilling Co.

EXHIBIT A

LAW OFFICES OF
SIEGEL, DENBERG, VANASCO, SHUKOVSKY, MOSES & SCHOENSTADT

Avondale Centre * Suite 1700 * Twenty North Clark Street * Chicago, Illinois 60602

(312) 541-5505 Telecopier (312) 372-4744

Kenneth H. Denberg
Michael A. Moses
Richard G. Schoenstadt
David J. Shukovsky
Morton Siegel
Robert A. Vanasco

James L. Webster

April 25, 1985

Mr. Ed Vaughn, Director
Alcohol and Tobacco Tax Unit
Georgia Department of Revenue
270 Washington Street, S.W.
Atlanta, GA 30334

re: James B. Beam Distilling Co./Application for Credit for Beverage Alcohol Taxes

Dear Director Vaughn:

Enclosed please find James B. Beam Distilling Co.'s application for claim for refund pursuant to § 48-2-35 (Ga. Code Ann.) for distilled spirits excise taxes erroneously and illegally assessed and collected from Beam under § 3-4-60(1) (Ga. Code Ann.). Said claim is made for the years 1982, 1983 and 1984.

The authority upon which Beam relies is set forth under Subpar. 4, entitled "Basis of Claim". I would appreciate your contacting the undersigned for purposes of setting

up a conference relative to disposition of this claim. I will be out-of-town the week of April 29 and will be back in the office on Monday, May 6.

Thank you for your attention to this matter.

Very truly yours,

Morton Siegel

(Attachment to Siegal Letter)

GEORGIA DEPARTMENT OF REVENUE
ALCOHOL AND TOBACCO TAX UNIT
319 TRINITY-WASHINGTON BUILDING
ATLANTA, GEORGIA 30334

Telephone Number (404) 636-4263

APPLICATION FOR CREDIT FOR
BEVERAGE ALCOHOL TAXES

PART 1 – To be filled in by claimant.
JAMES B. BEAM DISTILLING CO.

1. NAME AND ADDRESS OF CLAIMANT
500 North Michigan Avenue

ADDRESS	CITY	STATE	ZIP CODE
	Chicago,	Illinois	60601

2. KIND OF TAX CREDIT CLAIMED

DISTILLED SPIRITS [X] MALT BEVERAGE [ ]
WINE [ ]

3. AMOUNT OF TAX CREDIT CLAIMED

$649,000.00 - 1982 $ 894,000.00 - 1984
$857,000.00 - 1983 $2,400,000.00 - TOTAL

4. BASIS OF CLAIM (Give the detailed information for which the claim is filed and other facts which will [Illegible] Revenue Commissioner the [illegible] for the claim. Please identify any documents or statements submitted in support of this claim.)

James B. Beam Distilling Co.'s claim for refund is pursuant to § 48-2-35 (Ga. Code Ann. for the reason that § 3-4-60 (Ga. Code Ann.) has imposed an excise tax on

distilled spirits which is unconstitutional, because it violates the Commerce Clause, Art. I. Sec. 8 Cl. 3 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The Georgia Department of Revenue, Alcohol, Tobacco and Tax Unit has erroneously and illegally assessed and collected from James B. Beam Distilling Co. under the laws of the State of Georgia the aforementioned excise tax on distilled spirits, commencing with the inception of the imposition of the tax. Notwithstanding said imposition of the tax, this claim is for the years 1982, 1983 and 1984.

The basis for Beam's claim is the principle enunciated by the United States Supreme Court in *Bacchus Imports, Ltd. v. Herbert H. Dias, Director of taxation of the State of Hawaii*, 104 S. Ct. 3049 (1984), and *Metropolitan Life Insurance Company, et al. Appellants v. W. G. Ward, Jr., et al.*, 53 Lw 4399 (3/26/85). Copies of both decisions are attached hereto.

Georgia's excise tax on distilled spirits imposed a higher tax rate on distilled spirits *imported* into the state than on distilled spirits *manufactured* in the State of Georgia. This erroneous classification represented preferential tax treatment for distilled spirits product manufactured in the State of Georgia. In *Bacchus*, the Supreme Court concluded that a similar taxing structure in Hawaii had both the purpose and effect of discriminating in favor of local products (Commerce Clause), and more recently, the Supreme Court in *Metropolitan Life* held that Alabama's preferential tax statute violated the Equal Protection Clause.

* * *

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES B. BEAM DISTILLING CO., a Delaware Corporation,

Plaintiff,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Defendants.

CIVIL ACTION FILE NO. D-42527

(Filed May 26 1987)

ANSWER

COME NOW the above-named defendants and answer and defend against the complaint in the above-styled case as follows:

FIRST DEFENSE

The present action is barred by the doctrine of sovereign immunity and official immunity.

SECOND DEFENSE

Defendants Harris, Collins, and Vickers have at all times acted in good faith and within the scope of their authority.

THIRD DEFENSE

The court lacks subject matter jurisdiction over the present action.

FOURTH DEFENSE

The complaint fails to state a claim upon which relief can be granted.

FIFTH DEFENSE

Defendants respond to the individual paragraphs of the complaint as follows:

1.

Admit the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 19, and 20 of the complaint.

2.

Deny the allegations contained in paragraphs 9, 10, 11, 12, and 16 of the complaint.

3.

State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 13, 14, and 15 of the complaint.

4.

State that paragraphs 17 and 21 state legal conclusions and require no response of these defendants.

5.

Admit that plaintiff filed a claim for refund and that a facsimile of said claim is attached to the complaint as Exhibit A, but deny all other allegations contained in paragraph 18 of the complaint.

6.

Deny each and every allegation of the complaint not hereinbefore specifically admitted, qualified, or denied.

7.

Deny that the plaintiffs are entitled to any of the requested relief.

WHEREFORE, having fully answered, defendants pray:

(a) that the present action be dismissed or that judgment be entered in favor of defendants;

(b) that costs be cast upon the plaintiffs; and

(c) for such other and further relief as the court deems necessary and appropriate.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

H. PERRY MICHAEL 504000
First Assistant Attorney General

/s/ Verley J. Spivey
VERLEY J. SPIVEY 672700
Senior Assistant Attorney General

/s/ Jeff L. Milsteen
JEFF L. MILSTEEN 509820
Assistant Attorney General

PLEASE ADDRESS ALL COMMUNICATIONS TO:

JEFF L. MILSTEEN
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 656-2278
(Our File No. 63AA-LA-52193-87)

CERTIFICATE OF SERVICE

I do hereby certify that I have this date served a copy of the foregoing ANSWER upon:

John L. Taylor, Jr.
Chorey, Taylor & Feil
500 Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303

by placing the same into the United States mail with adequate first class postage placed thereon.

This 26th day of May, 1987.

/s/ Jeff L. Milsteen
JEFF L. MILSTEEN
Assistant Attorney General

O.C.G.A. § 3-4-60 (1982):

ARTICLE 4

EXCISE TAXATION

PART 1

STATE

3-4-60. Levy and amount of tax.

The following state excise taxes are levied and imposed:

(1) On the importation of all distilled spirits imported into this state, a tax of $1.00 per liter and on all alcohol imported into this state, a tax of $1.40 per liter, and a proportionate tax at the same rate on all fractional parts of a liter;

(2) On the manufacture of all distilled spirits manufactured in this state from Georgia-grown products, a tax of 50¢ per liter and on all alcohol manufactured in this state from Georgia-grown products, a tax of 70¢ per liter, and a proportionate tax at the same rate on all fractional parts of a liter. (Ga. L. 1937-38, Ex. Sess., p. 103, §§ 11, 12; Ga. L. 1964, p. 62, § 3; Ga. L. 1972, p. 207, § 6; Ga. L. 1974, p. 615, § 1; Ga. L. 1976, p. 692, § 1; Ga. L. 1977, p. 1154, § 2; Ga. L. 1978, p. 1645, § 1; Code 1933, § 5A-2701, enacted by Ga. L. 1980, p. 1573, § 1; Ga. L. 1981, p. 1269, § 35.)

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAMES B. BEAM DISTILLING CO., a Delaware Corporation, Plaintiff, v. STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services, Defendants.	CIVIL ACTION FILE NO. D-42527 (Filed May 27, 1988)

FINAL ORDER

This action came on for hearing on Cross Motions for Summary Judgment filed by plaintiff and defendants. The questions presented for resolution by the Court are whether O.C.G.A. §3-4-60, as that statute existed and was applied in 1982, 1983 and 1984 (prior to its amendment in 1985) violated the Commerce Clause and the Equal Protection Clause of the United States Constitution by discriminating against out-of-state producers of alcoholic beverages in order to promote the manufacture of alcoholic beverages and the local production of the component materials of alcoholic beverages within Georgia.

UNDISPUTED FACTS

The Court observes that there is no genuine dispute with respect to the following material facts:

1.

James B. Beam Distilling Co. (hereinafter "James Beam") is a Delaware corporation.

2.

James Beam is a producer and importer of alcoholic beverages.

3.

James Beam is engaged in business in interstate commerce throughout the United States.

4.

James Beam is permitted by federal and Georgia authorities to import alcoholic beverages.

5.

James Beam ships and sells alcoholic beverages produced outside the State of Georgia to licensed wholesalers doing business in the State of Georgia.

6.

Defendant Joe Frank Harris is the Governor of Georgia.

7.

Joe Frank Harris is the State official who has authority, under O.C.G.A. §48-2-35(a), to authorize a refund of taxes.

8.

Defendant Marcus E. Collins is the Georgia State Revenue Commissioner (hereinafter "Commissioner") and is the State official who is charged with the duty to administer and enforce the State's revenue laws, including the taxes imposed under O.C.G.A. §3-4-60.

9.

Defendant Claude L. Vickers is the Director of the Fiscal Division of the Department of Administrative Services of the State of Georgia (hereinafter "Fiscal Division").

10.

The Commissioner is directed to remit to the Fiscal Division the taxes (and penalties, interest, and fees) collected under O.C.G.A. §3-4-60.

11.

The jurisdiction of this Court is predicated upon, and venue in this Court is proper pursuant to, O.C.G.A. §48-2-35(4)(A).

12.

As a condition to selling alcoholic beverages to Georgia wholesalers, James Beam, during the time period relevant to this action, was required under O.C.G.A. §§3-4-60 and 3-4-61 to pay the applicable state excise taxes by purchasing stamps in proper denominations denoting the payment of taxes and affixing such stamps to each bottle or container of alcoholic beverages.

13.

Pursuant to O.C.G.A. §48-2-35(a), a taxpayer shall be refunded any and all taxes which are determined to have been illegally assessed and collected from the taxpayer under the laws of the State of Georgia, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes at the rate of 9% per annum from the date of payment of the tax to the Commissioner.

14.

On or about April 25, 1985, James Beam made a claim for refund of taxes assessed and collected from James Beam during 1982 through 1984 under O.C.G.A. §3-4-60 (hereinafter "Refund Claim").

15.

The Refund Claim is in the form and contains such information as required pursuant to O.C.G.A. §48-2-35(b)(1).

16.

In the Refund Claim, James Beam requested a conference or hearing before the Commissioner in connection with the claim, but the Commissioner failed to grant a conference.

17.

The Refund Claim was not decided by the Commissioner or his delegate within one year from the date of filing the Refund Claim.

18.

Because the Refund Claim was not decided by the Commissioner or his delegate within one year from the date of filing, O.C.G.A. §48-2-35(4) gave James Beam the right to bring an action for refund in this Court.

19.

Pursuant to O.C.G.A. §48-2-35(5), this action is timely commenced.

20.

Under O.C.G.A. §3-4-60, as codified during the time period relevant to this action, locally produced distilled spirits are taxed at 50 cents per liter.

21.

Under O.C.G.A. §3-4-60, as codified during the time period relevant to this action, locally produced alcohol is taxed at 70 cents per liter.

22.

Under O.C.G.A. §3-4-60, as codified during the time period relevant to this action, distilled spirits manufactured outside Georgia are taxed at $1.00 per liter.

23.

Under O.C.G.A. §3-4-60, as codified during the time period relevant to this action, alcohol manufactured outside Georgia is taxed at $1.40 per liter.

24.

All alcoholic beverages covered by O.C.G.A. §3-4-60, as codified during the time period relevant to this action, are taxed proportionately at the applicable rate on all fractional parts of a liter.

25.

No legislative history or other evidence is contained in the record to support the State's contention that

O.C.G.A. §3-4-60 was originally enacted with a disparity to cover the added cost of regulating this imported product.

26.

O.C.G.A. §3-4-60 was enacted to encourage Georgia residents to grow products used to produce alcohol and distilled spirits.

CONCLUSIONS OF LAW

1.

O.C.G.A. §3-4-60 was enacted exclusively for the benefit of Georgia grown products and Georgia manufacturers of alcohol.

2.

The disparity in taxation in O.C.G.A. §3-4-60 was unrelated to the costs of regulation and enforcement.

3.

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984) provides that if either the purpose or effect of a state tax is to discriminate in favor of local businesses or goods, then the legislation may constitute "simple economic protectionism" and, if so, is virtually *per se* invalid. This Court holds that, as a matter of law, the effect of O.C.G.A. §3-4-60 is discriminatory against alcoholic beverages produced outside the state of Georgia in that said beverages are taxed at twice the rate of beverages produced in

Georgia from Georgia-grown products. The Twenty First Amendment to the United States Constitution permits the State to discriminate under certain now more clearly defined circumstances where interstate commerce of alcohol is involved.

4.

"[O]nce a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available non-discriminatory means." *Main v. Taylor*, ___ U.S. ___, 106 S. Ct. 2440, 2448 (1986). This Court holds that, in view of the facially discriminatory effect of the statute as it existed during the years in question, the burden to show a legitimate local purpose has fallen to the State. The defendants in this action have not met their burden to show a correlation between the higher tax on out-of-state alcoholic beverages and the contended additional costs involved in regulating such beverages, which the defendants claim to be the justification for the disparity.

5.

This Court further holds that the purpose of O.C.G.A. §3-4-60, as it existed during the years in question, was economic protectionism, i.e., to benefit local business and local industry. This purpose is indicated by the legislative history, 1937-38 Ga. Laws Ex. Sess. 115, 117 (alcohol and distilled spirits). *See also* 1937 Ga. Laws 851, 853-54 & 1935 Ga. Laws 492 (the original purpose of the

discrimination against "foreign wines" was "to foster and encourage the growing of grapes, fruits and berries on Georgia farms" and "to exempt from all taxation wines made . . . by producers in Georgia of such crops". The protectionist purpose of the statute is further indicated by the exhibits "A-3" through "A-13" produced by the plaintiff in opposition to the defendants' Motion for Summary Judgment and produced to plaintiff by the defendants pursuant to this Court's Order of December 3, 1987).

"Examination of the State's purpose in this case is sufficient to demonstrate the State's lack of entitlement to a more flexible approach permitting an inquiry into the balance between local benefits and the burden on interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)." *Bacchus*, 468 U.S. at 270.

6.

The decision of the Georgia Supreme Court in *Heublein, Inc. v. Georgia*, 256 Ga. 578, 351 S.E.2d 190 (1987) is not dispositive of this case for the reason that the application of the Twenty First Amendment to the United States Constitution to the statute there under attack saved the State in light of record substantiating the necessity for a higher tax on distilled spirits produced outside Georgia. Such is not the case here. That case involved O.C.G.A. §3-4-60 as amended in 1985 to alter the preferential taxing scheme by applying an add-on tax on the importation of alcoholic beverages manufactured outside the State of Georgia and the amount of the add-on tax was justified by the present additional expense necessary to regulate

this industry. Here, the record before this Court concerning a statute in effect for 30 years, is silent as to any such need existing at the time of its enactment. Viewing the statute attacked here in light of *Bacchus* one clearly discerns that the original purpose of the 1938 Act was economic protectionism and the Commerce Clause has been violated notwithstanding the authority granted the States under the Twenty First Amendment. The State has shown, via *Heublein*, that there is a reasonable difference in the costs of administering control over imported and domestic alcoholic beverages. However, the State may not bootstrap its argument contending that this evidence somehow supplies a non violative purpose for the 1938 Act.

7.

The contention that the statute in question violates the Equal Protection Clause of the Constitution is meritless. Like *Heublein* this case involves " 'purely economic matters that traditionally merit only the mildest review under the Fourteenth Amendment.' " *Heublein Inc. v. State of Georgia*, 256 Ga. 578, 585 (1987) (quoting *Craig v. Boren*, 429 U.S. 190, 207 (1976)). The stated purpose of the 1938 Act for "legalizing and controlling" the importation of alcoholic beverages supports a finding that the import tax is rationally related to a legitimate state objective of regulating the importation of alcohol pursuant to the Twenty First Amendment when tested by the requirements solely of equal protection. The disparity in taxes is inconsequential in an equal protection context.

8.

This Court holds that the statute in question, as it existed during the years of 1982, 1983 and 1984 was an unconstitutional infringement upon interstate commerce in violation of the Commerce Clause of the United States Constitution. However, this decision is to be applied prospectively, resulting in no refund to the plaintiff of the taxes paid pursuant to that statute for the above years. Georgia has adopted the test of *Chevron Oil Co. v. Huston*, 404 U.S. 97, 106-107 (1971) in determining whether a ruling should apply retroactively. *Federated Mutual Insurance Co. v. DeKalb County*, 176 Ga. App. 70, 72 (1985). These factors require that the Court (1) "must establish a new principle of law, either by overruling clear past precident [sic] on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . " *Chevron*, 404 U.S. at 106 (citations omitted); (2) " 'weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' " *Id.* at 106-07 (quoting *Linkletter v. Walker*, 381 U.S. 618 (1965)); (3) weighing the inequity imposed by application to determine whether the decision could "produce substantial inequitable results". *Id.* at 107 (citations omitted).

9.

First, in the present action, the decision of this Court establishes a new principle of law by overruling a past

statute on which defendants relied. *See Strickland v. Newton County*, 244 Ga. 54, 55 (1979); *Ashland Oil Inc. v. Rose*, 350 S.E.2d 531, 535 (W. Va. 1986). Second, it is unnecessary to address the retrospective operation of the decision of this Court by applying a "weighing of the merits" test since the offending statute was amended in 1985 to remove its Constitutional infirmaties and no effort will be made hereafter to assert its validity by defendants. Lastly, the Court declines to apply this decision retroactively since it finds that here, as in a prior Georgia Supreme Court decision, "unjust results would accrue to those who justifiably relied on it."] *Strickland v. Newton County*, 244 Ga. 54, 55 (1979); *Preston Carroll Co. v. Morrison Co.*, 173 Ga. App. 412, 414, *rev'd on other grounds*, 254 Ga. 608 (1985).

ORDER

Based on the foregoing Findings and Conclusions, it is hereby ORDERED and ADJUDGED as follows:

1.

The Court having considered the entire record including all exhibits submitted hereby GRANTS the Motion for Summary Judgment filed by plaintiff James B. Beam Distilling Company to the extent that it seeks to declare unconstitutional O.C.G.A. §3-4-60 and the Motion for Summary Judgment filed by defendants is accordingly DENIED.

2.

The Court having found that the test required by *Chevron Oil Co. v. Huston* has been met, hereby DIRECTS that this decision as it affects the imposition of taxes shall be applied prospectively. The Court hereby DIRECTS that the date of prospective application of this decision shall be the date of the enactment of the amendment to O.C.G.A. §3-4-60 and shall apply only to tax liability of plaintiff, if any, as of the date the statute was enacted in its present form. Having concluded that this decision should not be applied retroactively so as to allow plaintiff to recover a refund under O.C.G.A. §42-2-35(b)(1), and that this decision shall apply prospectively, plaintiff shall recover nothing. Further, the Court finds there is no just reason for delay and DIRECTS that Judgment be entered.

So ORDERED this 27th day of May, 1988.

/s/ Ralph H. Hicks
RALPH H. HICKS, JUDGE
Fulton Superior Court
Atlanta Judicial Circuit

CASE NUMBER 46642

IN THE SUPREME COURT
FOR THE STATE OF GEORGIA

JAMES B. BEAM DISTILLING CO.,
Appellant,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Appellees.

BRIEF OF APPELLANT

COUNSEL OF RECORD: MORTON SIEGEL
SIEGEL, MOSES & SCHOENSTADT
10 EAST HURON
CHICAGO, ILLINOIS 60611
TELEPHONE: 312/664-8998

ADDITIONAL COUNSEL: JOHN L. TAYLOR, JR.
MICHAEL A. COLE
VINCENT, CHOREY, TAYLOR & FEIL
A PROFESSIONAL CORPORATION
THE LENOX BUILDING, SUITE 1700
3399 PEACHTREE ROAD, N.E.
ATLANTA, GEORGIA 30326
TELEPHONE: 404/841-3200

IN THE SUPREME COURT
FOR THE STATE OF GEORGIA

JAMES B. BEAM DISTILLING CO.,
Appellant,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Appellees.

CASE NO. 46642

BRIEF OF APPELLANT

I. Statement of Jurisdiction

Plaintiff/Appellant's complaint sought a refund of taxes paid pursuant to a Georgia statute that, during the years in question, improperly and unconstitutionally discriminated against out-of-state liquor manufacturers, of which Appellant is one. Therefore, since this appeal involves the constitutionality of a Georgia statute, jurisdiction is conferred upon this Court by Article 6, Section 6, paragraph 2 of the Constitution of the State of Georgia.

II. Judgment Appealed and Date of Entry

On May 27, 1988 an Order was entered by the Superior Court of Fulton County, State of Georgia, declaring unconstitutional O.C.G.A. § 3-4-60, as codified during the years in question – 1982, 1983 and 1984. (The statute, although superficially amended in 1985, grants preferential taxing treatment to alcoholic beverages manufactured from Georgia grown products in contravention of *Bacchus Imports. Ltd. v. Dias*, 468 U.S. 263 (1984).) A complete copy of the court's Order is herewith attached as Exhibit "A". At paragraph 9 of the Order the court declined to apply this decision retroactively so as to provide Appellant with a refund of the taxes that it paid during the years in question.

Appellant filed its Notice of Appeal with the superior Court on June 16, 1988 and on June 27, 1988 Appellees filed their Notice of Cross-Appeal. Both appeals were made to the Georgia Court of Appeals. On July 14, 1988 the parties by consent filed an Amended Notice of Appeal to place both the underlying appeal and cross-appeal before this Court, where they properly rest. However, because of a technicality in the way in which the Amended Notice of Appeal by consent was styled, the issue of whether the statute in question is unconstitutional originally was left before the Georgia Court of Appeals but has since been transferred to this Court in a separate appeal. Therefore, the sole issue before this Court in *this* appeal is the superior Court's ruling applying its decision prospectively only.

III. Legal Issues

Whether the trial court was correct as a matter of law in ruling its decision holding O.C.G.A. § 3-4-60 unconstitutional to be prospective only.

IV. Statement of Facts

This appeal arises out of Appellant James B. Beam Distilling Company's (hereinafter "James Beam") action in the trial court for the refund of taxes illegally assessed and collected from James Beam. S.R.-12 *et seq.* (O.C.G.A. § 48-235 (a) requires that the taxpayer be refunded all taxes "determined to have been erroneously or illegally assessed and collected. . . . ") James Beam ships and sells alcoholic beverages produced outside the State of Georgia to licensed wholesalers doing business in the State. S.R.-113 at paragraph 5. Defendants are the State of Georgia and its taxing authorities. *Id.* at paragraphs 6-10.

As a condition to selling alcoholic beverages to Georgia wholesalers, James Beam, during the time period relevant to the underlying action, was required under O.C.G.A. §§ 3-4-60 and 3-4-61 to pay the applicable state excise taxes on sales of its alcoholic beverage products. *Id.* at paragraph 12. O.C.G.A. § 3-4-60, prior to 1985, taxed locally produced "distilled spirits" at $.50 per litre and locally produced alcohol at $.70 per litre, while taxing their counterparts manufactured outside Georgia at $1.00 and $1.40, respectively. *Id.* at paragraphs 25 through 28. In 1982, James Beam paid taxes in the amount of $649,000.00; in 1983, in the amount of $857,000.00; and in 1984 in the amount of $894,000.00. *Id.* at paragraphs 13-15. Therefore the total amount of taxes improperly

levied against James Beam during the years in question amounted to $2,400,000.00.

In the trial court James Beam sought and was granted summary judgment on its contention that the taxes it paid during the years in question were illegally assessed and collected because O.C.G.A. § 3-4-60, as it existed and was applied during the years in question, was unconstitutional, both in its purpose and effect. Relying on the authority of *Bacchus Imports, Limited v. Dias*, 468 U.S. 263 (1984), Appellant asserted that the unconstitutional purpose and effect of O.C.G.A. § 3-4-60 were to discriminate against out-of-state producers of alcoholic beverages and unfairly to promote local commerce in the form of in-state producers. The unconstitutional purpose and effect were achieved by applying a tax rate to alcoholic beverages manufactured elsewhere and imported into Georgia that was greater than the tax rate applied to in-state producers.

In the *Bacchus* case the United States Supreme Court overturned as unconstitutional a tax imposed by the State of Hawaii identical in operation to O.C.G.A. § 3-4-60. The Hawaii Statute imposed a twenty percent tax on sales of liquor at wholesale; however, certain alcoholic beverages made from locally grown products were exempted from the tax. 468 U.S. at 265. The Supreme Court held that the Hawaii tax was discriminatory and unconstitutional on its face. Therefore, James Beam alleged below, and the trial court so ruled, that O.C.G.A. § 3-4-60, was an unconstitutional infringement upon interstate commerce under *Bacchus*. See generally S.R.-242 *et seq*.

Not only did the trial court hold that the *effect* of the statute was unconstitutionally discriminatory, but also found at paragraph 5 of the Conclusions of Law in the Order, that the purpose/intent of the statute amounted to economic protectionism, *"i.e.*, to benefit local business and local industry". *Id.* at 248.

The purpose or intent of the statute was clearly revealed to the court below by the Appellant through exhibits filed pursuant to the cross motions for summary judgment. See Plaintiff's Response to Defendants' Motion for Summary Judgment, Exhibits "A-3" through "A-13", S.R.-182. These documents, produced by the Appellees after a motion to compel production by the Appellant and pursuant to court order, clearly reflect the intent and purpose of the statute, as expressly noted by the trial court at paragraph 5 of its Order. S.R.-248. For example, in Exhibit "A-6", Tom Crosby, Jr., a member of the Georgia House of Representatives representing District 150, requests an opinion from Attorney General Michael Bowers as to the implications for the Georgia tax in light of *Bacchus*. Representative Crosby admits, in paragraph 2 that, in a manner similar to the statute ruled unconstitutional in *Bacchus*, "Georgia law provides for preferential treatment of alcoholic beverages manufactured in Georgia or made from produce grown in Georgia or both."

A further admission was made by the State through its department of law in the form of a memo from David A. Runnion (Senior Assistant Attorney General) contained in Exhibit "A-7." Mr. Runnion observes that "while not a 100% tax exemption like Hawaii, the lower tax rates for Georgia produced liquor and wine clearly do favor local alcohol industries."

Even more ominous evidence of the unconstitutional animus of the statute was the behind-the-scenes involvement of the local liquor industry in an attempt to preserve their preferential treatment after the *Bacchus* decision. Exhibit "A-10" is a letter to Governor Joe Frank Harris from attorneys at King & Spalding, representing some vested local liquor interests. Section 1 of that letter relates to the legislative history of the statute and notes pointedly that "the purpose of the act was to promote manufacture of liquor and wine in Georgia with Georgia products." The letter also outlines several reasons for maintaining the pre-1975 tax treatment. (The tax was amended in 1985 ostensibly to avoid the effect of *Bacchus*.) One of these was to "[c]ontinue [the] long-standing policy of [the] state not to penalize or increase revenue laws against businesses which have local facilities in the state." Another reason given to maintain the "status quo" was to avoid wiping out the "incentives given for Georgia industries after millions have been invested in reliance on longstanding public policy and revenue laws. . . . "

In short, the trial court properly ruled, pursuant to *Bacchus*, that, since O.C.G.A. § 3-4-60 suffered both from discriminatory effect and purpose with respect to interstate commerce, the statute was unconstitutional. The propriety of that ruling has since been confirmed by subsequent rulings in other states dealing with protectionist statutes. *See, e.g., New Energy Company of Indiana v. Limbach*, ___ U.S. ___, 108 S.Ct. 1803 (1988); *National Distributing Company, Inc. v. State of Florida*, 523 So.2d 156 (1988); *Heublein, Inc. v. Department of Alcoholic Beverage Control of the Commonwealth of Virginia*, Record No. 860321, Supreme Court of Virginia, January 13, 1989; *Russell Stewart Oil Company v. State of Illinois*, 124 Ill.2d 116, 529 N.E.2d 484 (1988).

Despite the propriety of the ruling in the court below as to the constitutionality of the statute, the portion of the court's order giving its ruling prospective application only (S.R.-250 at paragraph 8) was (clearly) erroneous as a matter of law. In fact, O.C.G.A. § 48-2-35 *requires* that the taxes in question be refunded. Thus the Appellant brings this appeal seeking to overturn that portion only of the Order of the Superior Court dated May 27, 1988, which applies the court's ruling non-retroactively.

V. Enumeration of Errors

The trial court erred in its Order dated May 27, 1988 when, in paragraph 8 of that order, it applied prospectively only its ruling that O.C.G.A. § 3-4-60, as applied during the years in question – 1982, 1983 and 1984, constituted a constitutionally impermissible burden on interstate commerce.

VI. Argument and Citation of Authorities

In *Flewellen v. Atlanta Casualty Company*, 250 Ga. 709, 712, 300 S.E.2d 673 (1983), this Court adopted as Georgia law the test set forth by the United States Supreme Court in *Chevron Oil Company v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 355 (1971) for the retroactive application of judicial decisions and held that in deciding whether a court ruling should be applied retroactively a court should:

> (1) Consider whether the decision to be applied non-retroactively established a new principle of law,

either by overruling past precedent on which litigants relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

(2) Balance the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, whether retrospective operation would further or retard its operation.

(3) Weigh the inequity imposed by retroactive application, for, if a decision could produce substantial inequitable results if applied retroactively, there is ample basis for avoiding the injustice or hardship by a holding of non-retroactivity."

Clearly the facts before the Court in this case do not warrant a non-retroactive, or prospective only, application of the trial court's ruling that O.C.G.A. § 3-4-60, as applied during the years in question, was unconstitutional. Initially, there is a strong presumption in favor of the retroactive application of any judicial decision. "The overruling of a decision is generally retroactive. . . . " *Preston Carroll Company v. Morrison Assurance Company*, 173 Ga. App. 412, 326 S.E.2d 486 (1985); *rev'd on other grounds;* 254 Ga. 608, 331 S.E.2d 520 (1985). Moreover, the statutory law of the State of Georgia *requires* that the monies illegally and unconstitutionally collected from James Beam be refunded. O.C.G.A. § 48-2-35 reads, in pertinent part, as follows:

(a) A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner. Refunds shall be drawn from the treasury on warrants of the Governor issued

upon itemized requisitions showing in each instance the person to whom the refund is to be made, the amount of the refund, and the reason for the refund.

The statutory language simply does not admit of judicial discretion to apply decisions prospectively and thereby sidestep the very results mandated by the statute. Indeed, in *Bacchus* the Supreme Court noted that, "given an unconstitutional discrimination, [it may be that] a full refund is mandated by state law." *Bacchus* at 277, n. 14.

Under *Chevron*, and for the sake of discussion ignoring O.C.G.A. § 48-2-35, the only occasion for the court below to have considered limiting its determination that the statutory provisions in question were unconstitutional to a prospective application would be in the event that the decision in *Bacchus Imports, Limited v. Dias* "established a new principle of law". Clearly that was not the case. The United States Supreme Court in *Chevron*, defined what is meant by the establishment of a new principle of law: that the decision to be applied either overruled clear past precedent on which litigants may have relied or decided an issue of first impression "whose resolution was not clearly foreshadowed." *Chevron*, S.Ct. at 355. The decision to be applied by the court below in this case, *i.e., Bacchus* clearly did neither. An examination of the complete text of *Bacchus* shows that no prior decision was overruled. Moreover, *Bacchus* did not deal with an issue of first impression but rather reinforced longstanding precedent that no state may, consistent with the Commerce Clause of the United States Constitution, establish discriminatory, protectionist legislation in favor of local industry.

> A cardinal rule of Commerce Clause jurisprudence is that 'no state, consistent with the Commerce Clause may impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business' *Boston Stock Exchange v. State Tax Commission*, 249 U.S. 318, 329 (1977) (quoting *Northwestern State's Portland Cement Company v. Minnesota*, 358 U.S. 450, 458 (1959)).

Bacchus at 268.

In *Bacchus*, the Appellants challenged the constitutionality of a Hawaii tax identical in operation to O.C.G.A. § 3-4-60. The Hawaii statute imposed a twenty percent tax on sales of liquor at wholesale; however, certain alcoholic beverages made from locally grown products were exempted from the tax. 468 U.S. at 265. The Supreme Court held that the Hawaii tax was discriminatory and unconstitutional on its face. The position outlined by the Court in the *Bacchus* decision is simply one of the most recent proclamations of a well established principle.

> Our cases make clear that discrimination between instate and out-of-state goods is as offensive to the Commerce Clause as discrimination between in-state and out-of-state tax payers. Compare *I.M. Darnel & Son Company v. Memphis*, 208 U.S. 113 (1908), with *Maryland v. Louisiana*, 451 U.S. 725 (1981).

Id. at 268, n. 8. (Note that *Darnel* is a *1908* decision).

The Appellees may argue here, as in the trial court, that *Bacchus* constituted a radical departure from prior Supreme Court decisions balancing Twenty-First Amendment considerations against Commerce Clause considerations. See Defendant's brief in support of their motion for summary judgment, S.R.-141, beginning at p.4,

wherein Appellees argued that the 21st Amendment power to regulate alcoholic beverages overcomes any Commerce Clause concerns engendered by O.C.G.A. § 3-4-60 – an argument rejected in *Bacchus*. Appellees cited numerous U.S. Supreme Court decisions in support of this proposition. Those cases, however, give greater weight to Twenty-First Amendment considerations in upholding local statutes regulating alcoholic beverages, but which only *incidentally* affect interstate commerce. *See e.g., State Board of Equalization v. Young's Market Company*, 299 U.S. 59 (1936).

The analysis is different when there is a finding that the effect on Interstate Commerce amounts to economic protectionism and "a finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose, *see Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 33, 352-353 (1977), or discriminatory effect, *see Philadelphia v. New Jersey, supra. See also Minnesota v. Cloverleaf Creamery Company, supra*, at 471, n. 15." *Bacchus* at 270. Appellees' argument might claim some (albeit dubious) merit in the context of the amended, post-1985 O.C.G.A. § 3-460, which explicitly purports to serve a constitutionally permissible purpose under the Twenty-First Amendment. Yet here, as in *Bacchus*, the motivation of the state legislature in promulgating and enforcing the statute pre-1985 hardly admits of dispute. Since that purpose was pure economic protectionism, there are no competing Twenty-First Amendment considerations. Viewed in this context, *Bacchus* does not constitute a radical departure from prior precedent, but rather a simple affirmation of a longstanding principle.

Moreover, even were this Court to determine that the situation presented in this case meets the first *Chevron* criterion, both the second and third criteria weigh against prospective application. The second criterion calls for the Court to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' " *Chevron* S.Ct. at 355, citing *Linkletter v. Walker*, 318 U.S. 618 (1965). The question is not, as Appellees argued below, whether prospectective application would further the purpose of the statute *as amended* in 1985, but whether it would further the purpose of the principle enunciated in the decision to be applied, *i.e., Bacchus*. Appellees' misinterpretation apparently stemmed from their reading of *Federated Mutual Insurance Co. v. DeKalb Co.*, 176 Ga. App 70, 335 S.E.2d 873 (1985), *aff'd*, 255 Ga. 522, 341 S.E.2d 3 (1986). In *Federated* the Georgia Court of Appeals held that *Cotton Mutual Insurance Co. v. DeKalb County*, 251 Ga. 309, 304 S.E.2d 386 (1983), should not be given retroactive effect. The Cotton States decision invalidated the local taxation of insurance premiums. After the decision in *Cotton States*, Federal Mutual brought suit against DeKalb County for a refund of the taxes it had paid. The decision focused on whether prospective application of the decision to be applied (*Cotton States*), would further the purposes of a corrective statute adopted in compliance with *Cotton States*, which were expressly "to avoid a windfall to insurance companies by providing that any recovery must be distributed on a pro rata basis to the policy holders . . . and to protect local governments by assuring that their coffers would not be depleted by tax refund

requests by requiring a written protest." *Federated*, 335 S.E. 2d at 877. Here, there are no such purposes outlined in the "corrective" statute. Moreover, the *Linkletter* decision makes it clear that the focus of this criterion is whether prospective application will further the purposes of the decision to be applied. Obviously, if the Appellees' interpretation is correct, a state could avoid retroactive application of a decision overruling a statute simply by passing corrective legislation outlining an acceptable purpose.

In any event, the clear import of the *Bacchus* decision was to eliminate local economic protectionism and its effects. Since the statute in question and its insidious encroachment on interstate commerce had been in place since the 1930s, the effects have no doubt been far-reaching. In order to further the purposes of promoting interstate commerce outlined in *Bacchus* the competitive balance between in-state and out-of-state manufacturers must be restored; to apply the *Bacchus* decision retroactively in Georgia, providing the Appellant with a not insubstantial refund, which could be passed along to its customers in the form of lower prices, would no doubt further this purpose.

Finally, the third *Chevron* criterion addresses the equities involved in retrospective versus prospective application of the decision to be applied. The Appellees took the position below that the purpose and intent of the statute pre-1985 was to provide revenue for the costs involved in regulating the importation of out-of-state alcoholic beverages. Presumably, the Appellees would have the court believe that this was done on behalf of the taxpayers of the state of Georgia who, were the tax not

borne by the out-of-state sellers and in-state consumers (to whom at least a portion of the tax is perhaps passed along in the form of higher prices), would bear the burden of this regulatory cost. As noted previously, the documents submitted in the trial court by the Appellants pursuant to the summary judgment motions make a sham of this argument. Clearly, the statute was enacted and has been sustained, not on behalf of the taxpayers of the state of Georgia, but on behalf of the vested interests of local distillers (many of which are not even locally owned) and their powerful local lawyers. Viewed in this context, it is difficult to maintain that it would be inequitable to return to the Appellant monies wrongfully appropriated on behalf of another (albeit concealed) vested interest.

In the *Chevron* case the United States Supreme Court focused on the defendant's good faith reliance on a prior consistent interpretation of a law that was overturned. "The most he could do was to rely on the law as it then was. 'We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights.' *Griffin v. Illinois*, 351 U. S. 12, 26 (Frankfurter, concurring in judgment)." *Chevron*, S.Ct. at 356. Conversely, this is not a case where taxes were innocently collected from the Appellant in the good faith belief that this was proper because of the entirely laudable purpose of funding the administrative costs involved in regulating out-of-state alcoholic beverages. Rather, the defendants now seek to hide the protectionist nature of the statute in question behind a newly-discovered and chaste purpose.

Appellees will no doubt argue that recent cases in other states have refused to apply retroactively decisions

similar to that of the trial court in this case involving similar "protectionist" legislation. *See, e.g., DABT, State of Florida v. McKesson Corp.*, 524 So. 2d 1000 (1988); *National Distributing Co., Inc. v. State of Florida*, 523 So.2d 156 (1988). Obviously, these decisions are in no way binding on this Court, and in fact, they provide poor guidance in addressing this issue. The DABT court expressly noted that "we need not determine whether the challenged provisions were in fact enacted to serve some underlying protectionist purpose." *Id.* at 1005. Neither did *National Distributing* involve this particular odious motivation which Appellant has proved to have informed the Georgia statute in question. Thus, again, the "equities" and "good faith" of the State, with which the Florida Supreme Court seemed so acutely concerned in *DABT* and *National Distributing*, give the State little comfort in the present case.

One suspects that the principal "equity" with which the State is concerned in cases such as this is in fact the *inconvenience* of having to refund monies that in all likelihood already have been spent. However, convenience is hardly a sufficient justification for allowing the State and the local liquor industry to keep their ill-gotten gain.

> The use of the prospectivity doctrine detracts attention from the real issues at stake, which are the State's sovereign right to preserve its treasury and the competing interest of taxpayers to a clear and certain remedy for constitutional violations. The complete denial of refunds resolves the tension between these competing interest entirely in favor of the State. Such an unbalanced resolution threatens the very purpose of the commerce clause.

Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 Tax Lawyer, 118-119 (Fall 1987).

The so-called prospectivity doctrine is in truth a judicially manufactured scapegoat used by some other states to retain tainted revenue; it would not do honor to the State of Georgia to join that group here, nor would it do justice to the Appellant or its customers in Georgia. When the "equities" are considered, it they are to be considered, the only inequity involved here was the unlawful appropriation of taxes from Appellant James Beam, which monies should be returned.

VI. Conclusion

Appellant submits that the decision of the court below to apply prospectively only its ruling that O.C.G.A. § 3-4-60, as it existed during the years in question, constituted an impermissible burden on Interstate Commerce was improper and erroneous. Appellant further submits that there are no equities weighing in favor of non-retroactive application of the trial court's decision; Appellants should be granted a refund, pursuant to O.C.G.A. § 48-2-35(a), of the taxes improperly and unconstitutionally assessed against and paid by the Appellant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael A. Cole, hereby certify that I have this day served a copy of the within and foregoing BRIEF OF APPELLANT by depositing a copy of same in the United States mail, postage prepaid as follows:

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This 21 day of February, 1989.

/s/ Michael A. Cole
Michael A. Cole

IN THE SUPREME COURT OF GEORGIA

JAMES B. BEAM DISTILLING CO., a Delaware Corporation,

Appellant,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, Individually and as Governor of the State of Georgia, MARCUS E. COLLINS, Individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, Individually and as Director of the Fiscal Division of the Department of Administrative Services,

Appellees.

CASE NO. 46642

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

STATEMENT OF JURISDICTION

The Supreme Court of Georgia has jurisdiction on appeal for the reason that this case, in which the constitutionality of a law has been brought into question, is one in which exclusive jurisdiction is vested in the Supreme Court by Art. VI, Sec. VI, Par. II of the Constitution of the State of Georgia of 1983. Furthermore, this case involves taxes imposed on alcoholic beverages by the State of Georgia and therefore, is one involving "state revenue" within the meaning of *Collins v. State*, 239 Ga. 400, 236 S.E.2d 759 (1977).

ISSUE PRESENTED

Whether the trial court was correct in ruling that its decision holding O.C.G.A. § 3-4-60, as codified in 1982,

1983 and 1984, unconstitutional shall apply prospectively only.

STATEMENT OF FACTS

This case involves a challenge to a statute that is no longer in effect. In the trial court below and in this appeal, the Appellant has challenged the constitutionality of O.C.G.A. § 3-4-60, as codified in 1982, 1983 and 1984 (hereinafter "the claim period"), and claimed a refund for taxes allegedly paid under this now repealed statute. (R. 12 through 18.) O.C.G.A. § 3-4-60, as codified during the claim period, imposed taxes on all alcoholic beverages manufactured in or imported into Georgia. Under the provisions of this statute, alcoholic beverages imported into the State by either in-state or out-of-state producers or manufacturers were subject to a higher tax than alcoholic beverages manufactured in Georgia. 1981 Ga. Laws, p. 1269, § 35, O.C.G.A. § 3-4-60 (Michie 1982).

A tax structure similar to that embodied by O.C.G.A. § 3-4-60 has been in effect in Georgia since 1938. The original legislation imposing taxes on alcoholic beverages manufactured and imported into Georgia was enacted in 1938 as Section 11 of the "Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors" (hereinafter the "1938 Act"). Ga. Laws 1937-38, Ex. Sess., p. 103.

Enacted not long after the end of Prohibition and the adoption of the Twenty-first Amendment, the 1938 Act was intended to provide for the "taxation, legalization, control, manufacture, importation, distribution, sale and storage of alcoholic beverages." Ga. Laws 1937-38, Ex.

Sess. p. 103. Under Section 11 of this Act, imported alcoholic beverages were subject to a higher tax than alcoholic beverages manufactured in Georgia.

Shortly after its enactment, Section 11 of the 1938 Act, like the statute at issue here, was challenged on the grounds that it violated the Commerce Clause of the Constitution of the United States. In *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939), *overruled on other grounds, Blackston v. Georgia Department of Natural Resources*, 255 Ga. 15, 334 S.E.2d 679 (1985), this Court upheld the constitutionality of Section 11, finding that it did not violate the Commerce Clause.

Since 1938, the tax system created by Section 11 of the 1938 Act has been amended several times to revise rates and effect other minor changes. The most recent amendment to Section 11 was in 1985, which amendment repealed the statute at issue in this case. The 1985 Amendment, like its predecessors, imposes a higher tax on alcoholic beverages imported into Georgia than on alcoholic beverages manufactured in Georgia. Ga. Laws 1985, p. 665, O.C.G.A. § 3-4-60 (Michie 1988 Supp.).

In April of 1985, the 1985 Amendment was challenged on the grounds that it violated the Commerce Clause and the Equal Protection Clause of the United States Constitution. As in *Scott*, this Court upheld the constitutionality of the 1985 Amendment, finding that it did not violate the Commerce Clause. *Heublein, Inc. v. Georgia*, 256 Ga. 578, 351 S.E.2d 190, *appeal dismissed*, ___ U.S. ___, 107 S.Ct. 3253 (1987).

Also in April of 1985, the Appellant filed a claim with the Georgia Revenue Department for a refund of taxes

allegedly paid pursuant to O.C.G.A. § 3-4-60, as codified during the claim period, challenging therein the constitutionality of the statute. (R. 19 through 20.) On or about April 24, 1987, the Appellant filed this tax refund action pursuant to O.C.G.A. § 48-2-35. (R. 12.) In its Complaint, the Appellant challenged O.C.G.A. § 3-4-60, as codified during the claim period, on the grounds, that its import tax provision (hereinafter "the pre-1985 import tax provision") violated the Commerce Clause and the Equal Protection Clause of the United States Constitution. (R. 12 through 19.)

This matter came before the trial court on cross motions for summary judgment. (R. 242.) After hearing these motions, the Superior Court of Fulton County, on May 27, 1988, entered an order holding O.C.G.A. § 3-4-60, as codified during the claim period, unconstitutional under the Commerce Clause and granting Appellant partial summary judgment. (R. 242, 252.) The trial court made this finding, despite the similarity between O.C.G.A. § 3-4-60, as codified during the claim period, and Section 11 of 1938 Act and the 1985 Amendment upheld by this Court. The Appellees have appealed this ruling of the trial court, which appeal is currently pending before this Court as *State of Georgia, et al. v. James B. Beam Distilling Co.* (Case No. 46681). (Case No. 46681, R. 1.)

Although the trial court found O.C.G.A. § 3-4-60, as codified during the claim period, unconstitutional, it directed that its decision apply prospectively only and that Appellant recover nothing. (R. 252.) It is this ruling to which the Appellant objects in this appeal. As demonstrated below, however, the trial court was correct in

giving its decision prospective effect only and in denying any refund to the Appellant.

ARGUMENT AND CITATION OF AUTHORITIES

Although the trial court erroneously found O.C.G.A. § 3-4-60, as codified during the claim period, to be unconstitutional, it correctly gave its ruling prospective operation. The trial court's decision to give prospective effect to its declaration of unconstitutionality is well supported by case law and by the equities of this case.

In *Great Northern Railroad Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), the United States Supreme Court established that courts have the power to fashion their decrees on the constitutionality of statutes in such a manner that those decrees operate only prospectively. Indeed, since the *Sunburst* decision, scores of courts, both federal and state, have given prospective effect only to their decisions, thereby denying relief such as refunds of monies paid to states under statutes found to be unconstitutional. *E.g., Lemon v. Kurtzman*, 411 U.S. 192 (1973) (court denied plaintiff's demand for refund of monies paid under statute allowing public funds to be paid to sectarian schools); *American Trucking Associations v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (Ark. 1988) (out-of-state truckers were not entitled to refund of taxes found violative of the Commerce Clause); *Division of Alcoholic Beverages and Tobacco v. McKesson*, 524 So.2d 1000 (Fla. 1988) (court applied ruling prospectively, thereby denying refund of taxes paid under alcoholic beverage statute); *National Distributing Co. v. Office of the Comptroller*, 523 So.2d 156 (Fla. 1988) (prospective ruling appropriate

where equities weighed against refund of taxes paid under alcoholic beverage statute); *Federated Mutual Insurance Co. v. DeKalb County*, 255 Ga. 522, 341 S.E.2d 3 (1986) (equities favored prospective application and no refund of gross premium taxes); *Metropolitan Life Ins. Co. v. Commissioner of Insurance*, 373 N.W.2d 399 (N.D. 1985) (court denied refund of taxes paid under statute giving domestic insurance companies tax preference).

In the State of Georgia, it is well established that "retroactive application [of a judicial decision] is not compelled constitutionally or otherwise" and should be declined "where unjust results would accrue to those who justifiably relied upon the prior rule." *Federated Mutual Insurance Company v. DeKalb County*, 176 Ga. App. 70, 335 S.E.2d 873 (1985) (citations omitted); *see also Strickland v. Newton County*, 244 Ga. 54, 258 S.E.2d 132 (1979) (decision holding local option sales tax unconstitutional should be applied prospectively to avoid unjust results). *Preston Carroll Co. v. Morrison Assurance Co.*, 173 Ga. App. 412, 414, 326 S.E.2d 486, *reversed on other grounds*, 254 Ga. 608, 301 S.E.2d 520 (1985) (retroactive application of decision would be unjust where there was good faith reliance on challenged law). Indeed, Georgia courts have found that retroactive application should be declined if it "would unjustifiably disrupt existing relationships," particularly where, as here, "there has been a good faith reliance on an unconstitutional statute." *Allan v. Allan*, 236 Ga. 199, 208, 223 S.E.2d 445, 452 (1976).

As noted by the trial court, Georgia courts have adopted the test set forth by the United States Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) in determining whether a ruling should apply prospectively.

(R. 250.) *Federated Mutual Insurance Co. v. DeKalb County*, 255 Ga. 522, 341 S.E.2d 3 (1986). Under the three-pronged *Chevron Oil* test, a court deciding whether to apply a decision prospectively should:

> (1) Consider whether the decision to be applied non-retroactively established a new principle of law, either by overruling past precedent on which litigants relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. (2) Balance . . . the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect and whether retrospective operation would further or retard its operation. (3) Weigh the inequity imposed by retroactive application, for, if a decision could produce substantial inequitable results if applied retroactively, there is ample basis for avoiding the injustice or hardship by a holding of non-retroactivity.

Federated Mutual Insurance Co., 176 Ga. App. at 72, 335 S.E.2d at 875 (citations omitted).

In a recent tax refund case very similar to the instant action, this Court and the court of a appeals followed the *Chevron Oil* test in affirming the trial court's ruling that a particular decision should apply prospectively only. *Federated Mutual Insurance Co. v. DeKalb County*, 255 Ga. 522, 341 S.E.2d 3 (1986); *Federated Mutual Insurance Co. v. DeKalb County*, 176 Ga. App. 70, 335 S.E.2d 873 (1985). The plaintiff in *Federated Mutual* sought a refund of gross premium taxes paid pursuant to a county ordinance that had been declared invalid by an earlier decision – *i.e.*, the *Cotton States* decision.

In applying the first prong of the *Chevron Oil* test, the court of appeals concluded that prospective application

was appropriate because the *Cotton States* opinion decided an issue of first impression. In reaching this conclusion, the court noted that insurance companies had paid the taxes at issue for almost 24 years without ever challenging the validity of the county ordinance. 176 Ga. App. at 74, 355 S.E.2d at 876.

Under the second prong of the test, the court of appeals decided in favor of prospective application on the grounds that it would further the purpose of amendments passed since the *Cotton States* decision and avoid the imposition of a severe economic burden on local governments. With respect to the burden refund payments would impose on local governments, the court noted that:

> [I]t is apparent that local governments would be required to refund large sums of money for which the funds may not now be available. The fact that the sums could amount to millions of dollars could present a financial stability problem for those local governments required to make such refunds, and could cause local governments to increase taxation and/or reduce existing services.

176 Ga. App. at 75, 335 S.E.2d at 877.

Under the final prong of the *Chevron Oil* test, the court of appeals determined that the equities clearly favored prospective application. In reaching this conclusion, the court found not only that the county had collected the taxes in good faith, but also that the taxpayer had passed on the tax to its customers. 176 Ga. App. at 76, 355 S.E.2d at 877-78.

As in *Federated Mutual*, an application of the *Chevron Oil* test to this case clearly demonstrates that the trial court was correct in giving its decision prospective effect only. Prospective application of the trial court's decision would not only further the purposes of the current alcoholic beverage tax statute, but would also prevent unjust results to those who reasonably relied on O.C.G.A. § 3-4-60, as codified during the claim period.

In applying the first prong of the *Chevron Oil* test to this case, it is clear that the decision of the trial court "establish[ed] a new principle of law by overruling a past statute on which [Appellees] relied." (R. 251.) Prior to the trial court's decision, the Appellees reasonably relied on case law upholding the constitutionality of Georgia's pre-1985 import tax. Indeed, in 1939, this Court, relying on United States Supreme Court decisions, upheld the constitutionality of the original import tax provision enacted in 1938 against a Commerce Clause challenge. *Scott v. The State*, 187 Ga. 702, 2 S.E.2d 65 (1939), *overruled on different grounds, Blackston v. Georgia Department of Natural Resources*, 255 Ga. 15, 334 S.E.2d 679 (1985) (the right of the State to regulate the importation of intoxicating liquor is not prohibited by the Commerce Clause). After the decision in *Scott*, the import tax was not challenged again until April of 1985, some fifty years later, when the Appellant filed its refund claim and the Plaintiff in *Heublein* initiated its unsuccessful lawsuit against the 1985 Amendment. During essentially the entire claim period, therefore, the Appellees had no reason to believe that the pre-1985 import taxes were unconstitutional.[1]

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[1] Even in June of 1984 when the Supreme Court rendered its decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984),

(Continued on following page)

Like the county government in *Federated Mutual*, the Appellees in good faith relied on the constitutionality of the pre-1985 import tax provision and used the money collected for public programs.

With respect to the second prong of the *Chevron Oil* test, the trial court properly found that it was unnecessary to engage in a weighing of the merits and demerits of the prospective operation of its decision, since the statute at issue was repealed in 1985 (R. 251). Even if the second prong of the *Chevron Oil* test were applied in this case, however, prospective application of the trial court's decision would be favored. As in *Federated Mutual*, a weighing of the merits would disfavor a retroactive application because it would require Georgia to refund large sums of money for which the funds are no longer available. The amount of tax refund that the Appellant alone is requesting is approximately 2.4 million dollars. In addition to the Appellant's claim, there are two other lawsuits currently pending in which claimants, represented by the same attorneys as the Appellant here, seek refunds of approximately 28 million dollars.[2] In light of presently pending claims of some 30 million dollars and the potential for other claims, a retroactive application of the trial court's

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(Continued from previous page)

it was not clear that Georgia's law was problematic as it differed in many respects from the Hawaii statute.

[2] The other pending tax refund actions are: *Heublein, Inc. v. Georgia*, Civil Action No. 87-3542-6 (DeKalb Superior Court) filed April 24, 1987; *Joseph E. Seagram & Sons, Inc. v. Georgia*, Civil Action No. 87-7070-8 (DeKalb Superior Court) filed September 4, 1987.

decision would produce severe financial consequences for Georgia.

Furthermore, the imposition of such a financial burden on the State would not further the purpose of the current import tax provision, which has been declared constitutional by this Court. *Heublein, Inc. v. Georgia*, 256 Ga. 578, 351 S.E.2d 190 (1987). The Georgia legislature amended the pre-1985 import tax provision after the Supreme Court decision in *Bacchus* and in so doing stated that one of the purposes of the 1985 Amendment was to help defray the high cost of regulating the importation of alcoholic beverages. A refund of taxes to the Appellant or any other importer, therefore, would clearly not be consistent with the express purpose and findings underlying the 1985 Amendment.

Finally, a balancing of the equities in this case favors prospective application in order to avoid unjust results to those who justifiably relied on the pre-1985 import tax provision. As in *Federated Mutual*, the State of Georgia collected the taxes at issue in good faith reliance that Georgia's import tax provision – which had been upheld by this Court – was constitutional. As noted by both the United States Supreme Court and this Court, protecting reasonable reliance upon a statute is an important and a valid concern, even where "that requires allowing an unconstitutional statute to remain in effect for a limited period of time." *Heckler v. Mathews*, 465 U.S. 728, 746 (1984); *see also Allan v. Allan*, 236 Ga. 199, 223 S.E.2d 445 (1976).

Moreover, prospective application would avoid the extreme financial burden and disruption that would be

created if the State were required to raise money to pay some 30 million dollars or more in tax refunds at a time when the State is struggling to find revenues to pay for billions of dollars in infrastructure needs. Such financial pressure and disruption would clearly not be justified where the taxes were collected and spent in good faith and the Appellant most likely passed on the cost of the taxes to its customers. Indeed, a retroactive application might very well result in a windfall to the Appellant and other claimants, who are seeking a total absolution of tax liability for three years. In short, the trial court correctly found that the equities in this case favor the prospective application of its decision.

Reasoning very similar to that found in the trial court's order is also found in two recent decisions by Florida Supreme Court. *Division of Alcoholic Beverages and Tobacco v. McKesson*, 524 So.2d 1000 (Fla. 1988); *National Distributing Co. v. Office of the Comptroller*, 523 So.2d 156 (Fla. 1988). In both of these cases, the Florida Supreme Court ruled that equitable considerations favored the prospective application of trial court decisions holding certain of Florida's alcoholic beverage tax statutes unconstitutional under the Commerce Clause. In both *McKesson* and *National Distributing Co.*, the Florida Supreme Court found, as did the trial court in this matter, that prospective operation was appropriate because Florida had relied in good faith on presumptively valid statutes, the funds collected had been expended, and the taxpayers had in all likelihood passed on the excess taxes to their customers. *McKesson*, 524 So.2d at 1010; *National Distributing Co.*, 523 So.2d at 158. In *National Distributing Co.*, the court also

noted that "unreasonable disruption of state government" would be caused by a retroactive application and that any benefits of a refund to the taxpayer were "far outweighed by the harm that would be inflicted upon [the] state's citizens and government." *National Distributing Co.*, 523 So.2d at 158.

As in the *McKesson* and *National Distributing Co.* cases, the equitable considerations in this case weigh strongly in favor of prospective application of the trial court's decision. Given the State's good faith reliance on O.C.G.A. § 3-4-60 and the severe burden a tax refund would impose on the citizens and government of this State, the trial court correctly ruled that its decision should apply prospectively only.

CONCLUSION

For the reasons set forth above, the Appellee respectfully requests that the Court affirm that part of the Superior Court's May 27, 1988 Order giving its holding of unconstitutionality prospective application only.

This 13th day of March, 1989.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this date served a copy of the foregoing BRIEF OF APPELLEES upon:

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This 13th day of March, 1989.

/s/ Amelia Waller Baker
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IN THE SUPREME COURT
FOR THE STATE OF GEORGIA

COMBINED CASE NOS. 46642 AND 46681

JAMES B. BEAM DISTILLING CO.,

Appellant/Appellee

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Appellees/Appellants,

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IN THE SUPREME COURT
FOR THE STATE OF GEORGIA

JAMES B. BEAM DISTILLING CO.,	:	
Appellant/Appellee	:	COMBINED CASE NOS. 46642 and 46681
v.	:	
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Appellees/Appellants	:	

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Appellees	:	

SUPPLEMENTAL BRIEF OF APPELLANT

I. STATEMENT OF THE CASE/STATEMENT OF FACTS

This appeal arises out of the trial court's order of May 27, 1988 declaring unconstitutional O.C.G.A. § 3-4-60, as codified during the years in question – 1982, 1983 and 1984. The statute grants preferential taxing treatment of alcoholic beverages manufactured from Georgia grown products in contravention of *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S. Ct. 3049 (1984). The two separate appeals from this ruling of the trial court require this Court to address two separate issues: (1) whether the trial court was correct in ruling that the statute in question, which taxes alcoholic beverages manufactured outside the State of Georgia at twice the rate of

in-state manufactured beverages, constitutes a violation of the commerce clause of the United States Constitution, and (2) if so, whether the Appellant James B. Beam Distilling Company is entitled to a refund of the taxes paid pursuant to the unconstitutional statute.

A detailed recounting of the facts is provided in the briefs already on file with the Court in both appeals, which were heard in oral argument before this Court on May 9, 1989. Appellant James B. Beam Distilling Company submits this its Supplemental Brief pursuant to Rule 41 of the Rules of the Supreme Court of the State of Georgia to address and highlight some of the issues raised during oral argument.

II. ARGUMENT AND CITATION OF AUTHORITIES

A. The Burden of Proof with Respect to the Purpose of the Statute Rests With the Appellees.

Much was made during the oral presentation of the issues in these appeals of the purpose of the statute. Particularly, the Court inquired as to which side had the burden of proof to demonstrate whether the purpose of the statute was a legitimate one that would pass muster under commerce clause analysis, or "simple economic protectionism," which clearly would require the statute to be struck down under *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S. Ct. 3049 (1984), discussed at length in the briefs already on file with the Court. Clearly and incontrovertibly, that burden rests with the Appellees.

> The burden of showing discrimination rests on the party challenging the validity of the statute. *Hughes v. Oklahoma*, 441 U.S. 322, 336, 99 S. Ct. 1727, 1736, 60 L.Ed.2d 250 (1979). Once discrimination is demonstrated, however, "the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of non-discriminatory alternatives adequate to preserve the local interests at stake." *Id.* (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353, 97 S. Ct. 2434, 2446, 53 L.Ed. 2d 383 (1977)). *"At a minimum . . . facial discrimination involves the strictest scrutiny of any purported legitimate local purpose* and the absence of nondiscriminatory alternatives." *Hughes*, 441 U.S. at 337, 99 S. Ct. at 1737. Stated differently, the State must demonstrate a "close fit" between the burden on interstate commerce and the asserted local purpose. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 957, 102 S. Ct. 3456, 3464, 73 L. Ed.2d 1254 (1982).
>
> *Norfolk Southern Corporation v. Oberly*, 632 F. Supp. 1225, 1232-33 (D. Del. 1986), *aff'd*, 822 F.2d 388 (3d Cir. 1987) (emphasis supplied).

That the statute in question is discriminatory on its face satisfies Appellant's burden "of showing discrimination." *See Hughes v. Oklahoma*, 441 U.S. 322, 99 S. Ct. 1727, 1736-37 (1979). *See also Sporhase v. Nebraska*, 102 S. Ct. at 3465 ("The State therefore bears the initial burden of demonstrating a close fit. . . . ") In short, facial discrimination, absent at least a pretextual justification by the State, sounds the death knell for a statute affecting interstate commerce. In fact, in almost every instance where the Supreme Court has considered a facially discriminatory statute in a commerce clause context, the statute has failed to pass muster. *See e.g., South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 104 S. Ct. 2237

(1984); *Sporhase v. Nebraska; Hughes v. Oklahoma: Philadelphia v. New Jersey*, 437 U.S. 617, 98 S. Ct. 2531 (1978); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844 (1970).

Appellees seek comfort from the Supreme Court's near unremitting hostility toward facially discriminatory legislation in *State Board of Equalization of California v. Young's Market Company*, 299 U.S. 59, 57 S. Ct. 77 (1936). Appellees in effect argue that, because of the special interest in regulating alcoholic beverages accorded the states under the Twenty First Amendment, Appellees are protected from the intense scrutiny given facially discriminatory statutes. *See* Brief of Appellants in case No. 46681 at p. 9. First, the *Bacchus* decision directly contradicts any such inference to be drawn from *Young's Market*. Appellees seek to explain away this roadblock in their argument by insisting that the Supreme Court gave the Twenty First Amendment argument short shrift in *Bacchus* because the State of Hawaii waited until the last minute to make the argument. However, nothing in the *Bacchus* decision in any way indicates that Hawaii's tardiness impacted on the Court's decision; the Supreme Court simply rejected the notion that the Twenty First Amendment somehow exempts facially discriminatory statutes regulating alcohol from commerce clause sanction.

Moreover, Appellees' reliance on *Young's Market* is misplaced. Plaintiffs in the *Young's Market* decision argued that *any* license fee imposed upon the importation of alcohol manufactured outside the state was *per se* invalid under the commerce clause:

> What the plaintiffs complain of is the refusal to let them import beer without paying for the privilege of importation. Prior to the Twenty-First Amendment . . . [the] imposition would have been void, not because it resulted in discrimination, but because the fee would be a direct burden on interstate commerce.

299 U.S. at 78.

In rejecting Plaintiff's argument in *Young's Market*, the Supreme Court simply followed the longstanding proposition that, provided the state interest is legitimate (*i.e.*, regulating alcohol under the Twenty First Amendment) a statute may impose incidental burdens upon interstate commerce. Beyond this, though *Young's Market* has never been expressly overruled, it clearly has been confined to its narrow facts. *See Bacchus*, 468 U.S. at 274, esp. n. 13. Clearly, the law in this respect is that where a State law impacting on interstate commerce does not regulate evenhandedly, the State must justify the disparity under a standard of strict scrutiny. *See Hughes v. Oklahoma*. *See also Norfolk Southern Corp. v. Oberly*, 822 F.2d at 401 and n. 18.

Thus, when faced with the irrefutable facially discriminatory nature of the statute in question, it became incumbent upon the State to come forward with evidence of a "close fit" between the burden on interstate commerce and the asserted local purpose. *Sporhase v. Nebraska ex rel. Douglas*, 102 S. Ct. at 3465. In the face of that burden, the Appellees presented *no evidence* indicating that it costs twice as much to regulate out-of-state alcoholic beverages as in-state beverages. In fact, the Appellees presented *no evidence at all* on this issue.

While Appellees contend that they presented evidence, in the form of legislative history, of the *purpose* of

the statute, this is not the "close fit" evidence required. Appellees assert that "the 1938 Act was intended 'to provide for the taxation, legalization, control, manufacture, importation, distribution, sale and storage of alcoholic beverages.' Ga. Laws 1937-38 Ex. Sess., p. 103.' " Brief of Appellants at p.3. However, when considering the purpose of a challenged statute, "this Court is not bound by '[t]he name, description or characterization given it by the legislature or the courts of the State, but will determine for itself the practical impact of the law.' " *Hughes v. Oklahoma*, 441 U.S at 336, 99 S. Ct. at 1736 (citation omitted). The following excerpt from the *Hughes* case succinctly summarizes the compelling argument for the unconstitutionality of the statute in question:

> Section 4-115(B) on its face discriminates against interstate commerce. It forbids the transportation of natural minnows out of the State for purposes of sale, and thus "overtly blocks the flow of interstate commerce at [the] State's borders." *Philadelphia v. New Jersey*, 437 U.S., at 624, 98 S. Ct., at 2535. Such facial discrimination by itself may be a fatal defect, regardless of the State's purpose, because "the evil of protectionism can reside in legislative means as well as legislative ends." *Id.*, 437 U.S. at 626, 98 S. Ct., at 2537. *At a minimum such facial discrimination invokes the strictest scrutiny* of any purported legitimate local purpose and of the absence of non-discriminatory alternatives.

441 U.S. at 336-37, 99 S. Ct. at 1736-37 (emphasis supplied).

From the foregoing, it is evident that no real inquiry into the *purpose* of the statute in question is even necessary to decide this case. "[A] discriminatory effect, as

distinct for [sic] incidental burden, evidences *purposeful* discrimination." *Norfolk Southern Corp. v. Oberly*, 822 F.2d at 401, n. 18 (emphasis in original). In fact, it is plain on the face of the *Bacchus* decision that the stricture of the commerce clause applies to statutes that are discriminatory in their purpose or effect. *Bacchus*, 468 U.S. at 270 ("a finding that State Legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose . . . or discriminatory effect. . . . ") *See Heublein, Inc. v. State*, 256 Ga. 578 (1987) (expressly noting the *Bacchus* holding that a commerce clause violation can be made "on the basis of either discriminatory purpose or discriminatory effect").

However, even delving into the purpose of the statute yields no consolation for the Appellees. Appellees seek to put blinders on the Court and would have it view the statute with tunnel vision, offering up the facile proposition that the stated purpose of the statute in 1938 was "to provide for the taxation, legalization, control, manufacture, importation, distribution, sale and storage of alcoholic beverages." This is not a legislative history, but rather a simple statement of purpose and, as noted in *Hughes v. Oklahoma*, the Supreme Court gives short shrift to the idea that a pretextual stated purpose can salvage a facially discriminatory statute from commerce clause scrutiny.[1]

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[1] For examples of the types of legislative history courts consider in determining statutory purpose in this context, *see e.g., Norfolk Southern Corporation v. Oberly*, 822 F.2d 388 (3rd Cir. 1987); *Baltimore Gas & Electric Company v. Heintz*, 760 F.2d 1408 (4th Cir. 1985).

In the absence of a clear legislative history or, as in this case, in the absence of *any* legislative history, the courts look "to the interpretation given the statute by those charged with administering it." *Baltimore Gas & Electric Company v. Heintz*, 760 F.2d 1408 (4th Cir. 1985). *See also Brothers v. First Leasing*, 724 F.2d 789, 792 (9th Cir. 1984). Despite the absence of any burden to do so, the Plaintiff has offered unrebutted evidence from the mouths of those charged with administering the statute in question, *i.e.*, the Georgia Department of Revenue, Alcohol and Tobacco Unit. For example, Plaintiff's Exhibit "A-4" is a document generated by the Revenue Department, and plainly states that "on one bushel of grain a Georgia distiller using Georgia-grown products receives *preferential tax treatment* of $11.50 or on average $7.50 more than the cost of the grain" and goes on to outline and analyze the benefit derived from local manufacturers as a result of the preferential tax treatment. (Emphasis supplied.) Exhibit "A-5", again produced by the Alcohol and Tobacco Tax Unit of the Revenue Department, addresses the "preferential alcohol excise tax" and discusses a proposal to eliminate the tax (presumably because of *Bacchus*), and the implications of such a proposal. In short, the *Appellees* bore the burden to show in the trial court that the statute served a legitimate state purpose and, given its facially discriminatory nature, served that purpose using the least discriminatory alternative. In the face of that burden, Appellees presented no evidence, and the Appellant in fact presented compelling evidence to the contrary.

B. The Georgia State Legislature has Mandated a Refund of the Taxes Paid Under O.C.G.A. § 48-2-35

There simply is no doubt that the statute in question is unconstitutional under *Bacchus* (tacitly admitted by the State when the statute was amended in 1985 in the wake of *Bacchus*). The only real question for decision by this Court is whether, given the unconstitutionally discriminatory nature of the statute, a rebate is mandated. However, the General Assembly has already decided this question through the enactment of a mandatory state law. As noted by the Court in *Bacchus*, "[i]t may be, for example, that given an unconstitutional discrimination, a full refund is mandated by State law." 468 U.S. at 277, n. 14. In this case, a refund *is* mandated through an unambiguous state law enacted by the General Assembly. *See* O.C.G.A. § 48-2-35 ("A taxpayer *shall* be refunded . . . ") discussed at length in Appellant's Brief and during oral argument. Thus, Appellees' arguments with respect to "weighing equities," the State's good faith reliance on *Young's Market*, and so forth, under *Chevron Oil Company v. Huson*, 404 U.S. 97, 92 S. Ct. 349 (1971), are totally irrelevant.

Of novel interest only is Appellees' argument that the taxes collected under the statute in question were not "erroneously or illegally assessed" until the statute was declared unconstitutional by the trial court. This argument was made during oral presentation without full consideration of its implications. If this argument is accepted, O.C.G.A. § 48-3-25 becomes a nullity in that no refund would *ever* be granted under the statute since presumably the right to a refund would not accrue until

after the tax has been declared illegal, at which point there would be nothing to refund. Likewise, as was observed in oral argument, no taxes would ever be refunded if the State could argue, as here, that they've spent the money and need it to fund other state services. In view of the obvious consequences of the mandatory nature of O.C.G.A. § 48-2-35 for Appellees' case, counsel for Appellees surely is to be applauded for a gallant effort, but surely such circular reasoning does not merit serious consideration. The General Assembly's enactment is binding, and the courts should not engage in the judicial repeal of a valid statute.

CONCLUSION

For the foregoing reasons, and further for those reasons stated in Appellants' initial and answer briefs in the underlying appeals, Appellant James B. Beam Distilling Company respectfully submits that the trial court's ruling declaring unconstitutional O.C.G.A. § 3-4-60, as it existed prior to 1985, must be upheld and, under the dictate of O.C.G.A. § 48-2-35, Appellant must be granted a full refund of the taxes paid during the years 1982, 1983 and 1984.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I, Michael A. Cole, hereby certify that I have this day served a copy of the within and foregoing SUPPLEMENTAL BRIEF OF APPELLANT by depositing a copy of same in the United States mail, postage prepaid as follows:

Jeff L. Milsteen, Esq.
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This 17 day of May, 1989.

/s/ Michael A. Cole
Michael A. Cole

_____

IN THE SUPREME COURT OF GEORGIA

JAMES B. BEAM DISTILLING CO., a Delaware Corporation, Appellant, v. STATE OF GEORGIA, *et al.*, Appellees.	*	CASE NO. 46642
STATE OF GEORGIA, *et al.*, Cross-Appellants, v. JAMES B. BEAM DISTILLING CO., a Delaware Corporation, Cross-Appellee.	*	CASE NO. 46681

SUPPLEMENTAL BRIEF OF APPELLEES
AND CROSS-APPELLANTS

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IN THE SUPREME COURT OF GEORGIA

JAMES B. BEAM DISTILLING CO., a Delaware Corporation, Appellant, v. STATE OF GEORGIA, *et al.*, Appellees.	*	CASE NO. 46642
STATE OF GEORGIA, *et al.*, Cross-Appellants, v. JAMES B. BEAM DISTILLING CO., a Delaware Corporation, Cross-Appellee.	*	CASE NO. 46681

SUPPLEMENTAL BRIEF OF APPELLEES
AND CROSS-APPELLANTS

INTRODUCTION

The above-referenced appeals arise out of a trial court order of May 27, 1988 declaring unconstitutional O.C.G.A. § 3-4-60, as codified in 1982, 1983 and 1984, and directing that this decision apply prospectively only. After the filing of briefs in these appeals, this Court heard oral argument on both appeals on May 9, 1989. Pursuant to Rule 41 of the Rules of the Supreme Court of Georgia, the State of Georgia, Joe Frank Harris, Marcus E. Collins and Claude L. Vickers, Appellees and Cross-Appellants

in the above-styled appeals (hereinafter the "Appellees"), hereby file this supplemental brief to address some of the issues raised during oral argument and raised by the supplemental brief of Appellant James B. Beam Distilling Company (hereinafter the "Appellant").

ARGUMENT AND CITATION OF AUTHORITIES

A. THE APPELLANT BEARS THE BURDEN OF ESTABLISHING THAT O.C.G.A. § 3-4-60, AS CODIFIED IN 1982, 1983 AND 1984, IS UNCONSTITUTIONAL.

In oral argument and in its briefs filed with this Court, the Appellant has repeatedly attempted to convince this Court that it should apply a standard of review and burden of proof that is wholly inappropriate in cases involving the Twenty-first Amendment. Despite the recognition by this Court in *Heublein, Inc. v. Georgia*, 256 Ga. 578, 351 S.E.2d 190, *appeal dismissed*, ___ U.S. ___, 107 Sup. Ct. 3253 (1987) that a strict commerce clause analysis does not apply in cases in which the principles of the Twenty-first Amendment are involved, such as here, the Appellant continues to argue and recite to this Court traditional commerce clause cases that do not involve the Twenty-first Amendment. Indeed, in its supplemental brief submitted to this Court, the Appellant cites no cases involving the interplay of the commerce clause and the Twenty-first Amendment in support of its argument that the Appellees bear the burden of demonstrating the validity of O.C.G.A. § 3-4-60, as codified in 1982, 1983, and 1984 (hereinafter the "pre-1985 import tax statute").

The Appellant cites no such cases because both the cases of this Court and of the Supreme Court establish that a different analysis is applicable in cases involving the Twenty-first Amendment. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966); *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936); *Heublein, Inc. v. Georgia*, 256 Ga. 578, 351 S.E.2d 190 (1987); *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939), *overruled on other grounds, Blackston v. Georgia Department of Natural Resources*, 255 Ga. 15, 334 S.E.2d 679 (1985). As discussed extensively in briefs filed by Appellees in this matter, this Court in *Heublein* and the Supreme Court in *Bacchus* stated that the test that should be applied in cases such as this is whether the taxes at issue sufficiently implicate central concerns of the Twenty-first Amendment so as to outweigh any commerce clause principles that might otherwise be offended.

Under this correct standard of review, it is clear that the statute at issue is constitutional as it does address central concerns of the Twenty-first Amendment. Indeed, the legislative history of the pre-1985 import tax statute expressly states that the statute was intended to provide for the regulation and control of alcoholic beverages, including their importation. Ga. Laws 1937-38, Ex. Sess. p. 103. The express purposes of the pre-1985 import tax, therefore, fall squarely within the central concerns of the Twenty-first Amendment.*

---

*On the contrary, the legislative history of the statute that was struck down in *Bacchus* expressly stated that the purpose of the statute was to foster local industry.

Where the statute at issue involves central concerns of the Twenty-first Amendment, such as here, the challenging party clearly bears the burden of establishing with competent evidence the invalidity of the statute. *See, e.g., Allstate Beer, Inc. v. Julius Wile Sons & Co.*, 479 F. Supp. 605, 610 (N.D. Ga. 1979) (only a "clear showing of arbitrariness would allow a court to substitute its judgment for that of the state legislature in the area of regulation of alcoholic beverages"); *Bartow Co. Bank v. Bartow Co. Board of Tax Assessors*, 251 Ga. 831, 312 S.E.2d 102 (1984) (court will not declare a statute void except in clear and urgent case); *Bohannan v. Duncan*, 185 Ga. 840, 196 S.E.2d 897 (1938) (burden of establishing invalidity of statute is on the attacking party). The Appellant, however, totally failed to meet this burden of proof in that it presented no competent evidence to the trial court to establish that the pre-1985 import tax statute does not involve central concerns of the Twenty-first Amendment.

Furthermore, contrary to the Appellant's assertions, it did not meet its burden of proof by showing that the statute at issue is discriminatory on its face. Indeed, if the Appellant's reasoning were correct, this Court would not have upheld the constitutionality of the current import tax statute in *Heublein*. The current import tax statute, like the pre-1985 import tax statute, on its face imposes a higher tax on alcoholic beverages imported into the State of Georgia than on alcoholic beverages manufactured in the State of Georgia. Although this differentiation in taxation might not be permissible under a traditional commerce clause analysis, as argued by the Appellant, this Court found in *Heublein* that a different treatment of imported and locally manufactured alcoholic beverages is

permitted where central concerns of the Twenty-first Amendment are involved. *See also State Board of Equalization v. Young's Market Co.*, 279 U.S. 59 (1936).

In short, the Appellant fails to recognize that a traditional commerce clause analysis is not appropriate in a case such as this where central concerns of the Twenty-first Amendment are involved. The Appellant continues to cling to traditional commerce clause cases and analysis and to ignore the line of Supreme Court cases establishing that the Twenty-first Amendment removes traditional commerce clause restraints on states when they act to control the importation of alcoholic beverages. It is the Twenty-first Amendment, however, that saves provisions like Georgia's pre-1985 import tax that might otherwise be unconstitutional under a pure commerce clause analysis. Under the analysis set forth in *Bacchus* and in *Heublein*, Georgia's pre-1985 import tax provision is a constitutional exercise of the State's Twenty-first Amendment powers and should be upheld.

B. TRIAL COURT CORRECTLY GAVE ITS RULING PROSPECTIVE EFFECT ONLY.

Although the trial court erroneously found O.C.G.A. § 3-4-60, as codified during the claim period, to be unconstitutional, it correctly gave its ruling prospective effect only. As discussed at length in Appellees' briefs in this case, it is well established that courts have the power to fashion their decrees on the constitutionality of statutes in such a manner that those decrees operate only prospectively. *Lemon v. Kurtzman*, 411 U.S. 192 (1973); *Great Northern Railroad Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358

(1932); *Federated Mutual Ins. Co. v. DeKalb County*, 255 Ga. 522, 341 S.E.2d 3 (1986); *Preston Carroll Co. v. Morrison Assurance Co.*, 173 Ga. App. 412, 414, 326 S.E.2d 486, *reversed on other grounds*, 254 Ga. 608, 331 S.E.2d 520 (1985); *Allan v. Allan*, 236 Ga. 199, 208, 223 S.E.2d 445, 452 (1976). Furthermore, this Court has specifically recognized that in a tax refund case a court may give its ruling prospective effect only and thereby deny a tax refund. *Federated Mutual Ins. Co. v. DeKalb County*, 255 Ga. 522, 341 S.E.2d 3 (1986) (equities favored prospective application and no refund of gross premium taxes). Indeed, there is no authority to suggest that the trial court in this case did not have the authority to give its ruling prospective effect only.

Faced with clear and abundant authority in support of the trial court's ruling of prospectivity, the Appellant, in its oral argument and in its briefs in this Court, has sidestepped a direct challenge to the prospectivity ruling and instead has asserted the new argument that the refund statute mandates a tax return. Not only is there no support for the Appellant's new argument, it is totally inconsistent with the opinions of this Court and other courts upholding trial court decisions to apply rulings prospectively and thereby to deny refunds of money paid to states under statutes found to be unconstitutional. *E.g.*, *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (court denied plaintiff's demand for a refund of monies paid under statute allowing public funds to be paid to sectarian schools); *American Trucking Associations v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (Ark. 1988) (out of state truckers were not entitled to refund of taxes found violative of the commerce clause); *Division of Alcoholic Beverages and*

Tobacco v. McKesson, 524 So.2d 1000 (Fla. 1988) (court applied ruling prospectively, thereby denying refund of taxes paid under alcoholic beverage statute); *National Distributing Co. v. Office of the Comptroller*, 523 So.2d 156 (Fla. 1988) (prospective ruling appropriate where equities weighed against refund of taxes paid under alcoholic beverage statute); *Federated Mutual Ins. Co. v. DeKalb County*, 255 Ga. 522, 341 S.E.2d 3 (1986); *Metropolitan Life Ins. Co. v. Commissioner of Ins.*, 373 N.W.2d 399 (N.D. 1985) (court denied refund of taxes paid under statute giving domestic insurance companies tax preference).

The Appellant's mandatory refund argument is also inconsistent with the trial court's finding that the facts and equities of this case clearly support a prospective application of the court's ruling. As the trial court correctly found, the State of Georgia relied in good faith on the constitutionality of the pre-1985 import tax statute for some fifty years. Indeed, during the entire claim period, the State in good faith collected and spent the taxes at issue. In light of this good faith reliance, the trial court concluded that it would be unjust to impose on the State the tremendous financial burden of raising money to pay some $30,000,000 or more in tax refunds. Moreover, such a financial burden could not be justified where the Appellant most likely passed on the cost of the taxes to its customers. In short, based on its findings, the trial court properly exercised its power to give its decision prospective effect only.

CONCLUSION

For the foregoing reasons, and for those reasons stated in Appellees' initial and answer briefs in the

underlying appeals, the Appellees respectfully request that this Court reverse the trial court's ruling declaring unconstitutional O.C.G.A. § 3-4-60, as codified in 1982, 1983 and 1984, and that this Court uphold the trial court's ruling that its decision be given prospective effect only.

This 1st day of June, 1989.

Respectfully submitted,

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This 1st day of June, 1989.

/s/ Amelia Waller Baker
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IN THE SUPREME COURT
FOR THE STATE OF GEORGIA

COMBINED CASE NOS. 46642 AND 46681

JAMES B. BEAM DISTILLING CO.,

Appelant/Appellee

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Appellees/Appellants,

SECOND SUPPLEMENTAL BRIEF OF
APPELLANT/CROSS-APPELLEE
JAMES B. BEAM DISTILLING COMPANY

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SUPREME COURT OF GEORGIA

IN THE SUPREME COURT
FOR THE STATE OF GEORGIA

JAMES B. BEAM, DISTILLING CO., Appellant/Appellee v. STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services, Appellees/Appellants	COMBINED CASE NOS. 46642 and 46681

SECOND SUPPLEMENTAL BRIEF
OF APPELLANT/CROSS-APPELLEE
JAMES B. BEAM DISTILLING COMPANY

I. INTRODUCTION

Appellant/Cross-Appellee James B. Beam Distilling Company files this its Second Supplemental Brief to address certain inaccuracies and misapplications of law of the Appellees/Cross-Appellants in their Supplemental Brief, as well as to point out to the Court recent authority shedding further light on the issues in this case, and

directly supporting James Beam's contentions therein. As the Court is no doubt by now well aware, this appeal arises out of the trial court's order declaring O.C.G.A. § 3-4-60 unconstitutional because of the preferential taxing treatment given by the statute to alcoholic beverages manufactured from Georgia grown products.

II. ARGUMENT AND CITATION OF AUTHORITIES

In their Supplemental Brief, Appellees continue to maintain that the Twenty-first Amendment somehow requires a special dispensation and particular lenient analysis/examination of this clearly facially discriminatory statute. At p. 2 of their Supplemental Brief, Appellees assert that "Appellant continues to argue and recite to this Court traditional commerce clause cases that do not involve the Twenty-first Amendment," as if there were a category of cases mandating that statutes employing the states, Twenty-first Amendment authority are to be handled with kid gloves. Appellees continue, "Indeed, in its supplemental brief submitted to this Court, the Appellant cites no cases involving the interplay of the Commerce Clause and the Twenty-first Amendment in support of its argument that the Appellees bear the burden of demonstrating the validity of O.C.G.A. § 30-4-60. . . . " Brief at pp. 2-3.

One need look no further than *Bacchus Imports. Ltd. v. Dias*, 468 U.S. 263 (1984), clearly the controlling authority in this case, to see that these statements are patently incorrect. "State laws that constitute mere economic protectionism are . . . not entitled to the same deference as

laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* at 276. In short, facially discriminatory statutes, whether involving liquor traffic or interstate commerce in any other commodity, are subject to the strictest scrutiny. Even though this proposition can hardly be disputed, it is further supported by the recent United States Supreme Court decision in *Healy v. The Beer Institute, Inc., et al.*, 57 U.S.L.W. 4748 (U.S. June 19, 1989). In that case the Supreme Court struck down Connecticut's beer "price-affirmation statute," passed under the aegis of the Twenty-first Amendment, and defended with the argument that the Twenty-first Amendment creates a special dispensation for discriminatory laws regulating alcoholic beverages. The statute in question required out of state shippers of beer to "affirm that their posted prices for products sold to Connecticut wholesalers are, as of the moment of posting, no higher than the prices at which those products are sold in the bordering states of Massachusetts, New York, and Rhode Island." *Id.* The statute on its face violated the Commerce Clause since it applied only to brewers and shippers engaged in interstate commerce and not to those engaged solely in Connecticut sales.

Critically relevant to this Court's decision in this case is the Supreme Court's affirmation in *Healy* of the "two tiered" approach it has adopted in analyzing state economic regulation under the commerce clause. " 'When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.' " *Id.*, citing *Brown-Forman Distillers Corp. v. New*

York State Liquor Authority, 476 U.S. 573, 579 (1986). Since *Healy* clearly and directly implicated a Twenty-first Amendment – supported statute, can there be *any* doubt that the Twenty-first Amendment gives *no* particular protection to facially discriminatory statutes? Interestingly, in support of its decision the Supreme Court cited numerous of the decisions cited in Appellant's Supplemental Brief, even though they are not Twenty-first Amendment cases – for which reason Appellees criticize the Appellant in their Supplemental Brief.

> In its previous decision, this Court has followed a consistent practice of striking down state statutes that clearly discriminate against interstate commerce, *see, e.g., New Energy Co. of Indiana v. Limbach*, ___ U.S. ___, 108 S.Ct. 1803 (1988); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), *unless that discrimination is demonstrably justified by a valid factor unrelated to economic protectionism, see, e.g., Main v. Taylor*, 477 U.S. 131 (1986).

Id. at p. 4753 (emphasis supplied). If the Appellees insist on a Twenty-first Amendment – specific case placing the burden of proof on the state to justify a statute with non-protectionist purposes, then Appellant submits that, by way of the foregoing quote, the United States Supreme Court has now supplied such a case, although *Bacchus* and the remaining commerce clause cases analyzing facially discriminatory statutes already made this proposition self-evident.

The Court continued: "Appellants' reliance on the Twenty-first Amendment is foreclosed by *Brown-Forman*, where we explicitly rejected an identical argument. In

Brown-Forman, the Court specifically held that the Twenty-first Amendment does not immunize state laws from invalidation under the commerce clause when those laws have the practical effect of regulating liquor sales in other states." *Id.* This proposition finds further compelling support in Justice Scalia's separate opinion concurring in part and concurring in the judgment. Justice Scalia finds that "despite the fact that the law regulates the sale of alcoholic beverages, . . . its discriminatory character eliminates the immunity afforded by the Twenty-first Amendment. *See Bacchus Imports. Ltd. v. Dias*, 468 U.S. 263, 275-276 (1984)."

In support of their proposition that "both the cases of this Court and the Supreme Court establish that a different analysis is applicable in cases involving the Twenty-first Amendment," Brief at p. 3, Appellees cite *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966). Although that case has, over the years, been limited and distinguished to the point where it applied only to its particular facts, in *Healy* the case was specifically overruled.

Finally, the thinness of Appellees' argument that "the challenging party clearly bears the burden of establishing with competent evidence the invalidity of the statute" (Brief, p. 4) is revealed by the inapplicability of the cases cited in support of that proposition. The quote cited by the Appellees from *Allstate Beer. Inc. v. Julius Wile Sons & Co.*, 479 F. Supp. 605, 610 (N.D. Ga. 1979) is taken from the section of the case dealing with substantive due process, not commerce clause analysis. *Bartow Co. Bank v. Bartow Co. Board of Tax Assessors*, 251 Ga. 831, 312 S.E. 2d 102 (1984) involves a matter of statutory interpretation, and the gist of that case is that a statute will be given an

interpretation to preserve its constitutionality. This case is not one of statutory interpretation; the statute is in no way vague or ambiguous, and is facially discriminatory, so that no "interpretation" is involved. Moreover, neither the *Bartow Co. Bank* case, nor *Bohannan v. Duncan*, 185 Ga. 840, 196 S.E.2d 897 (1938) involves either the Commerce Clause or the Twenty-first Amendment. Again, the Appellees' citation of these latter two state court cases involving statutory interpretation, one from 1938, as dispositive of proof issues under Twenty-first Amendment/ Commerce Clause analysis reveals the poverty of the Appellees' analysis in defense of a clearly invalid statute which was abandoned by the State in 1985 for the very reason of its invalidity.

CONCLUSION

For the foregoing reasons, and further for those reasons stated in Appellant's initial, Answer and Supplemental Briefs in the underlying appeals, Appellant James B. Beam Distilling Company respectfully submits that the trial court's ruling declaring unconstitutional O.C.G.A. § 3-4-60, as it existed prior to 1985, must be upheld, and under the dictate of O.C.G.A. § 48-2-35, Appellant must be granted a full refund of the taxes paid during the years 1982, 1983 and 1984.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael A. Cole, hereby certify that I have this day served a copy of the within and foregoing SECOND SUPPLEMENTAL BRIEF OF APPELLANT/CROSS-APPELLEE JAMES B. BEAM DISTILLING COMPANY by depositing a copy of same in the United States mail, postage prepaid as follows:

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This 30 day of June, 1989.

/s/ Michael A. Cole
Michael A. Cole

259 Ga. 363

JAMES B. BEAM DISTILLING COMPANY

v.

STATE of Georgia et al.

STATE of Georgia

v.

JAMES B. BEAM DISTILLING COMPANY

Nos. 46642, 46681.

Supreme Court of Georgia.

July 14, 1989.

Reconsideration Denied July 26, 1989.

MARSHALL, Chief Justice.

James B. Beam Distilling Co. (Beam) brought this action seeking a $2,400,000 refund for excise taxes it paid in 1982, 1983 and 1984. The taxes were paid pursuant to OCGA § 3-4-6, which imposed a higher tax on alcoholic beverages imported into the state than on those manufactured in Georgia. The statute was amended in 1985, shortly after the United States Supreme Court found a similar statute to be unconstitutional. *See, Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984).[1] In the proceedings below, the trial court determined that the pre-1985 statute was unconstitutional because it violated the Commerce Clause of the U.S. Constitution. The court further held that the

[1] The amended statute has been challenged and found to be constitutional. *See, Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190 (1987).

ruling would only be applied prospectively so that Beam is not entitled to a refund. We affirm.

1. The State appeals the trial court's decision that the pre-1985 version of OCGA § 3-4-60 was unconstitutional. We find no error. The statute imposed higher taxes on out-of-state products solely because of their origin. The record demonstrates that the purpose and effect of the statute was simple economic protectionism, which is virtually per se invalid under the Commerce Clause of the U.S. Constitution. *Id.*

2. Beam asserts that the trial court erred in applying the decision prospectively only. We disagree. In *Flewellen v. Atlanta Casualty Co.*, 250 Ga. 709, 300 S.E.2d 678 (1988), this Court adopted the three-pronged test set forth in *Chevron Oil v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), to be applied in deciding a retroactivity question:

> (1) Consider whether the decision to be applied nonretroactively established a new principle of law, either by overruling past precedent on which litigants relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.
>
> (2) Balance of the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation would further or retard its operation.
>
> (3) Weigh the inequity imposed by retroactive application, for, if a decision could produce substantial inequitable results if applied retroactively, there is ample basis for avoiding the injustice or hardship by a holding of nonretroactivity.

Flewellen, 250 Ga. at 712, 300 S.E.2d 673. Retroactive application of a judicial decision is not compelled constitutionally or otherwise[2] where unjust results would accrue to those who justifiably relied on the prior rule. *Strickland v. Newton County*, 244 Ga. 54, 258 S.E.2d 132 (1979) (decision holding local option sales tax should be applied prospectively to avoid unjust results).

Applying the first prong of the *Chevron* test, we note that the decision does not now establish a "new rule." However, if the decision had been rendered during 1984, the last year that the tax was assessed, it would certainly have overruled past precedent. The tax structure embodied in OCGA § 8-4-60 had been in effect in Georgia since 1938. In 1939 the statute was challenged on the grounds that it violated the Commerce Clause of the U.S. Constitution and was upheld. *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939), overruled on other grounds, *Blackston v. Georgia Department of Natural Resources*, 255 Ga. 15, 334 S.E.2d 679 (1985). After the *Scott* decision, the import tax was not challenged again until 1985. *See Heublein*, supra. During the time that the taxes at issue here were collected, the State had no reason to believe that the import taxes were unconstitutional. Moreover, when it became clear that

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[2] We are not persuaded by Beam's argument that OCGA § 48-2-35(a) mandates retroactive application of the constitutional decision. The statute provides, "A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him . . . " The statute does not describe how it should be determined that a tax was "illegally assessed." It simply does not address the issue of retroactive versus prospective application of a constitutional decision.

there might be constitutional problems with the statute, *see Bacchus*, supra, the legislature moved promptly to amend the statute to rectify the defects. Thus, it appears that the first prong of the *Chevron* test favors prospective application of the rule.

The second prong of the *Chevron* test has no application here because the statute at issue was repealed in 1985. We move therefore to the third prong of the test, which involves balancing the equities, Beam seeks 2.4 million dollars that it paid in 1982, 1983 and 1984. There are at least two other lawsuits currently pending in which other alcohol producers seek over 28 million dollars in tax refunds on the same grounds. Economic realities lead to the inescapable conclusion that the cost of this tax has or could have been already absorbed by the companies and passed on to Georgia consumers. Indeed, retroactive application of the ruling might well result in a windfall to the alcohol producers.

On the other hand, if the decision is applied retroactively, Georgia faces liability for over 30 million dollars in refunds for taxes it collected in good faith under an unchallenged and presumptively valid statute. Georgia would have to refund large sums of money that it has already spent. Prospective application would avoid imposing a severe financial burden on the State and its citizens. In such situations, this Court and the courts of other states have frequently declined retroactive application, even though the ruling allows an unconstitutional statute to remain in effect for a limited period of time. *See, Federated Mutual Ins. Co. v. DeKalb County*, 255 Ga. 522, 341 S.E.2d 3 (1986); *American Trucking Association v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988) (out-of-state

truckers were not entitled to refund of taxes found violative of the Commerce Clause); *National Distributing Co. v. Office of the Comptroller*, 523 So.2d 156 (Fla.1988) (prospective ruling appropriate where equities weighed against refund of axes paid under alcoholic beverage statute); *Metropolitan Life Ins. Co. v. Commissioner of Dept. of Insurance*, 373 N.W.2d 399 (N.D.1985) (no refund of taxes paid under statute giving unconstitutional preference to domestic insurance companies).

3. In 1939, this court upheld the precursor to the pre-1985 version of OCGA § 3-4-60 against a Commerce Clause challenge. *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939), *overruled on other grounds, Blackston v. Georgia Dep't of Natural Resources*, 255 Ga. 15, 334 S.E.2d 679 (1985). Now, some fifty years later, we are striking down its successor because it violates the Commerce Clause.

As the dissent points out, there are a number of cases strongly supporting the argument that because the statute was unconstitutional, it was void ab initio. *See, e.g., Dennison Mfg. Co. v. Wright*, 156 Ga. 789, 120 S.E. 120 (1923); *Battle v. Shivers*, 39 Ga. 405 (1869).

However, the rule of voidness ab initio is not an absolute rule. It has exceptions.

> "The general rule is that an unconstitutional statute is wholly void and of no force and effect from the date it was enacted. This harsh rule is subject to exceptions, however, where, because of the nature of the statute and its previous application, unjust results would accrue to those who justifiably relied on it. . . . " While we have declared statutes to be void from their inception when they were contrary to the Constitution at the time of enactment, . . . those decisions are not applicable to the present controversy, as the original . . . statute, when adopted, was not violative of the Constitution under court interpretations of that period.

Adams v. Adams, 249 Ga. 477, 478-79, 291 S.E.2d 518 (1982) (citations omitted) (quoting *Strickland v. Newton County*, 244 Ga. 54, 55, 258 S.E.2d 132 (1979) (citations omitted)). Other cases have held similarly. *E.g., Strickland v. Newton County*, 244 Ga. 54, 55, 258 S.E.2d 132 (1979); *Allan v. Allan*, 236 Ga. 199, 207-08, 223 S.E.2d 445 (1976). In all of these cases, the court has applied its decision prospectively rather than retroactively.

We apply the exception to the general rule. Here, the state has collected taxes under this statute or its predecessors over a half century in reliance on a decision of this court. Under these circumstances and the balancing factors discussed in division two, *supra*, we hold it would be unjust to declare the statute void ab initio.

In sum, we conclude that prospective application of the decision is appropriate. The decision of the trial court is affirmed in all respects.

Judgment affirmed. All the Justices concur, except SMITH and WELTNER, JJ., who dissent as to Divisions 2 and 3.

46642, 46681. JAMES B. BEAM DISTILLING COMPANY V. STATE OF GEORGIA et al. and vice versa.

SMITH, Justice, concurring in part and dissenting in part.

The problem with this case is that it is too simple. All that is involved is a statute which has been declared

unconstitutional, a constitutional provision which requires this Court to declare the unconstitutional statute *void*, and a statute which says taxes erroneously or illegally collected must be refunded. This case involves the state's illegal collection of taxes from a single, readily-identifiable party on the basis of an unconstitutional statute. The majority has successfully avoided the clear mandate of the Georgia Constitution, Georgia case law, and the Georgia refund statute. The "complicated exceptions" which the majority pointed out only make the simplicity of this case more pronounced. In short, the majority opinion is an excellent example of the judiciary attacking the solid rock of established Georgia constitutional law and Georgia case law with a hoe and trying to convince everyone that it's a bulldozer.

TAXPAYER'S RIGHTS

By placing emphasis on the issue of whether the decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984)[1] should be given a retroactive application, the majority disguises the real issue: Which is more important in Georgia – the state's

[1] The Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277, 104 S.Ct. 3049, 3058, 82 L.Ed.2d 200 (1984), declined to address the refund issue. It remanded the case to the Supreme Court of Hawaii to determine the refund issues "which are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce . . . " 468 U.S. at 277, 104 S.Ct. at 3058. The Court did note, "It may be, for example, that given an unconstitutional discrimination, a full refund is mandated by state law." Note 14. Here the statute unconstitutionally discriminated against non-resident taxpayers and a full refund is mandated by state law.

right to protect the ill-gotten gains of the treasury or the taxpayer's right to relief after a clear violation of the taxpayer's constitutional rights? See Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 Tax Lawyer (Fall 1987).

The majority opinion concludes that the state's right to protect its treasury is more important; however, I believe that the right of the taxpayer is more important.[2] The majority found, and I agree, that "the purpose and effect of the statute was simple economic protectionism, which is virtually per se invalid under the Commerce Clause of the U.S. Constitution."

Thus, I concur in the part of the majority opinion that affirms the trial court's holding that the pre-amendment statute was unconstitutional; however, there are several separate and distinct statutory and constitutional issues involved in this case that clearly distinguish it from the cases that have been cited by the majority.[3] Therefore, I

[2] As we celebrate this Fourth of July, we are reminded that one of the sparks which ignited the Revolutionary War was the abusive manner in which the colonists were being taxed by the King. Our forefathers fought and won independence from a King who extracted excessive taxes, and the Constitution was drafted to protect the people from such abuses.

[3] Only one Georgia case was cited by the majority in division two which allegedly supports its conclusion that "an unconstitutional statute [may] remain in effect for a limited period of time." This case, *Federated Mutual Ins. Co. v. DeKalb County*, 255 Ga. 522, 341 S.E.2d 3 (1986), dealt with a repeal of a statute or ordinance by implication. The constitutionality of the

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strongly disagree with the majority's conclusion "that prospective application of the decision is appropriate."

DISCUSSION OF THE MAJORITY OPINION

1. This Court adopted the test for retroactive application of judicial decisions set forth in *Chevron Oil v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) in *Flewellen v. Atlanta Casualty Co.*, 250 Ga. 709, 300 S.E.2d 673 (1983), but *Flewellen* did not declare a statute unconstitutional.[4]

The majority also states in division two: "Retroactive application of a judicial decision is not compelled constitutionally or otherwise where unjust results would accrue to those who justifiably relied on the prior rule." As set out in Div. 3, infra, of this dissent, there is no question of "retroactive application of a judicial decision" when a statute is declared unconstitutional in Georgia. Once a statute is declared unconstitutional it becomes the *constitutional duty* of the judiciary to declare the statute *void*.

2. The majority would have us believe an earlier unsuccessful constitutional challenge in *Scott v. State*, 187

(Continued from previous page)

statute was not involved. The other cases cited were foreign, and the majority did not show that those states have constitutional provisions similar to Georgia's. Under our constitution a statute is either constitutional and valid or unconstitutional and *void*. The constitution does not mandate a holding of "partial voidness."

[4] The only issue in *Flewellen* involved the proper interpretation and application of state insurance statutes.

Ga. 702, 2 S.E.2d 65 (1939), somehow negates the constitutional mandate requiring this Court to declare the unconstitutional statute *void*. There is nothing in the Georgia Constitution indicating that reliance upon earlier decisions of this Court in any way changes or modifies the mandate of the constitution to declare unconstitutional statutes *void*.

THE GEORGIA CONSTITUTIONAL MANDATE

3. Our constitution *requires* us to declare unconstitutional legislative acts *void*. Ga. Constitution 1983, Art. I, Sec. II, Par. V.[5] That constitutional provision does not allow this Court to set a specific date upon which an unconstitutional statute becomes inoperative. It does not allow this Court to determine that a statute is just a little bit void. It does not allow this Court to ignore its clear mandate or the long line of Georgia cases that have upheld the constitutional mandate. Nor can this Court rely on United States Supreme Court decisions that are not on point and in which the Georgia Constitution was never discussed or considered. (See Div. 5, infra, discussion of *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940).) Instead our constitution and case law require us to declare unconstitutional acts entirely *void* from their inception.

> An unconstitutional statute, though having the form, features, and name of law, is in reality no

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[5] Paragraph V of the 1983 Georgia Constitution entitled "What acts void" states: "Legislative acts in violation of this Constitution or the Constitution of the United States are void, and the judiciary shall so declare them."

law. It is wholly void. In legal contemplation it is as inoperative as if it had never been passed. It has been declared that it is a misnomer to call such statute a law. Such a statute confers no authority upon any one, and affords protection to no one. *Norton v. Shelby County,* 118 U.S. 425 (6 Sup.Ct. 1121, 30 L.ed. 178); *Ex Parte Siebold,* 100 U.S. 371, 376 (25 L. ed. 717); [Cits.]; *McCants v. Layfield,* 149 *Ga.* [231] 238, (99 S. E. 877).

In *Osborn v. Bank of the United States,* 9 Wheat. 738 (6 L. ed. 204), Chief Justice Marshall declared that "it is an extravagant proposition that a void act can afford protection to the person who executes it." In *Boston v. Cummins,* 16 *Ga.* 102, 106 (60 Am. D. 717), this court declared that "The unconstitutional acts of the legislature, State and Federal, *are not laws;* and *no court will execute them, having a proper sense of its own obligations and responsibilities.*" In *Wellborn v. Estes,* 70 *Ga.* 390 this court said: "Legislative acts in violation of the constitution of this State or of the United States are void." The constitution of this State declares that "Legislative acts in violation of this constitution or the constitution of the United States are void, and the judiciary shall so declare them." Proceedings under an unconstitutional statute had before such statute is judicially declared to be unconstitutional are void. *Jordan v. Franklin,* 131 *Ga.* 487 (52 [62] S. E. 673); *Worth County v. Crisp County,* 139 *Ga.* 117 (3) (76 S.E. 747); *James v. Blakely,* 143 Ga. 117 (84 S. E. 431). (Emphasis supplied in part.)

Dennison Mfg. Co. v. Wright, 156 Ga. 789, 797, 120 S.E. 120 (1923). See also *State Highway Department v. H.G. Hastings Co.,* 187 Ga. 204, 215, 199 S.E.2d 793 (1938); *Tarpley v. Carr,* 204 Ga. 721, 727, 51 S.E.2d 638 (1949) (City officers were not *de facto* officers of office created under an unconstitutional charter); *Franklin v. Harper,* 205 Ga. 779, 784, 55

S.E.2d 221 (1949); *Baggett v. Linder,* 208 Ga. 590, 591, 68 S.E.2d 469 (1952); *Milam v. Adams,* 216 Ga. 440, 444, 117 S.E.2d 343 (1960); *K. Gordon Murray Productions, Inc. v. Floyd,* 217 Ga. 784, 787, 125 S.E.2d 207 (1962) (" . . . the remedy provided in the ordinance is not even law if the petitioner's constitutional attack is sustained.") *Dobson v. Brown,* 225 Ga. 73, 76, 166 S.E.2d 22 (1969) (" 'Not even estoppel can legalize or vitalize that which the law declares unlawful and void.' "); and *Mapp v. First Georgia Bank, et al.,* 156 Ga.App. 380, 274 S.E.2d 765 (1980). (See note 7, infra.)[6]

Although *Bacchus* may have led this Court to conclude that the Georgia statute, in the present case was unconstitutional, it does not affect Art. I, Sec. II, Par. V of the Georgia Constitution which provides that an unconstitutional statute is void from its inception. Once the statute was declared unconstitutional, it was as if no statute, case law, or public policy had ever been established. "The Constitution is irrepealable, and any law in violation of it is void – is null; rights *cannot* grow up under such a law." *Battle v. Shivers,* 39 Ga. 405, 417 (1869). Once the statute was declared unconstitutional it became inoperative, as if it had never been passed. Therefore, no court having a proper sense of its own obligations and responsibilities will execute it. *Dennison,* supra, 156 Ga. at 797, 120 S.E. at 120. The state had no authority to assess or collect the taxes, and this Court has no authority to execute a void statute.

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[6] The law in this area has been so firmly established that few recent cases discuss the issue.

THERE ARE NO EQUITIES TO BALANCE

4. The majority's discussion of "balancing the equities," is misplaced. When a statute is declared unconstitutional, there can be no balancing of equities as none exist. "[W]e are bound to follow the laws of this state and the decisions of our Supreme Court even when . . . the resulting decision effects a hardship. . . . " *Mapp v. First Georgia Bank, et al.*, 156 Ga.App. 380, 381, 274 S.E.2d 765 (1980).[7]

COURT CREATED "EXCEPTIONS" TO THE GEORGIA CONSTITUTION

5. A careful reading of the three cases cited by the majority for the "exceptions" to the constitutional mandate reveals a fundamental weakness. The first case to deviate from the constitutional mandate and the feeble

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[7] On May 26, 1976 appellant Mapp purchased an automobile from Ed Cook. The car had been purchased by Cook from Hopkins Chevrolet, Inc., which in turn had purchased the automobile from Timmer Chevrolet, Inc., pursuant to a sale under the Georgia Abandoned Motor Vehicle Act. On October 26, 1976, First Georgia Bank repossessed the automobile, claiming that it held a perfected security interest in the automobile which had been created at the time of the initial purchase by C.J. Wilson. Mapp filed suit against the Bank, alleging that the Bank had illegally converted the automobile. The trial court granted summary judgment in favor of the Bank, concluding that Mapp's title was invalid on the basis of a 1979 case which held the Georgia Abandoned Motor Vehicle Act to be unconstitutional. Since the sale was in accordance with an act which was later held to be unconstitutional, the sale passed no title. The Court of Appeals affirmed the trial court's ruling because an unconstitutional statue is a void statute from its inception and no rights accrue thereunder.

foundation relied upon in the other two cited cases is *Allan v. Allan*, 236 Ga. 199, 223 S.E.2d 445 (1976). The Court in *Allan*, without any discussion of the Georgia Constitution or the long line of Georgia cases that have declared that an unconstitutional statute is *void*, relied instead upon dicta set forth by the United States Supreme Court in *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374, 60 S.Ct. 317, 318, 84 L.Ed. 329 (1939). However, immediately preceding the *Chicot* dicta that the majority relied upon, the following appeared:

> [An] Act of Congress, having been found to be unconstitutional, [is] not a law; that it [is] inoperative, conferring no rights and imposing no duties. . . . *Norton v. Shelby County* 118 U. S. 425, 442 [6 S.Ct. 1121, 1125, 30 L.Ed. 178]; *Chicago, I. & L. Ry. Co. v. Hackett*, 228 U. S. 559, 566 [33 S.Ct. 581, 584, 57 L.Ed. 966].

Chicot at 374, 60 S.Ct. at 318.

An even more astonishing discovery in reading *Chicot* is that *Chicot* cited *Norton v. Shelby County*, the exact same case cited in *Dennison*, supra, (see Div. 3 of this dissent), for the proposition that an unconstitutional statute "confers no authority upon any one, and affords protection to no one." See division 3 of this dissent. The *Allan* opinion ignored the above language with its two citations to Supreme Court decisions and quoted dicta that was completely devoid of a citation to any decision of any court.[8]

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[8] The language relied upon by *Allan* was totally unnecessary in adjudicating the *Chicot* case. The respondents in *Chicot*

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Reliance on unsupported *Chicot* dicta in *Allan* or in any other case is totally without foundation and substance. The cases that follow *Chicot* and *Allan* represent abberations that should be overruled because they conflict with the Georgia Constitution and Georgia cases. See also *Strickland et al. v. Newton County, et al*, 244 Ga. 54, 258 S.E.2d 132 (1979) and *Adams v. Adams*, 249 Ga. 477, 479, 291 S.E.2d 518 (1982) which use *Allan* and *Chicot* as their authority.

THE EXTRAORINDARY FACTS OF THE THREE CASES

6. Assuming *arguendo* that the cases are not abberations but do in fact represent "exceptions," then they offer the strongest arguments for declaring this case is not such an "exception." Each of the "exception cases" contained unusual and extraordinary conditions that are not present in this case. By applying the alleged "exceptions" to the general rule, the majority has made the "exceptions" the rule.

In the three cases that represent the "exceptions," the Court in attempting to do equity, did not face the constitutional mandate head-on.

In *Allan*, *Strickland*, and *Adams*, there may have been other individuals who may have been harmed in the past, but they were, for all practical purposes, unascertainable.

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failed to raise a constitutional issue in the courts below; therefore, the case was "appropriately confine[d] . . . to the question of *res judicata*. . . . " 308 U.S. at 375, 60 S.Ct. at 319.

The amount of damage suffered by other individuals was also almost impossible to determine. In *Allan* and *Adams* there was also the potential of disrupting years of quiet titles and confusing property law.

This case, on the other hand, involves one clearly-identified taxpayer who paid the state an ascertainable amount of money in illegal taxes over a specified period of time; therefore, there is no difficulty in determining to whom the taxes should be refunded and for what amount. In addition, such a refund would not disturb property law.

The "exceptions" are built upon a faulty unconstitutional foundation, and they should fall. They are court-made, but not constitutionally allowed.

THE CONSTITUTION IS THE WILL OF THE PEOPLE

7. The supreme power of this state is in the people and the written constitution is the will of the people. The people have decided that the judiciary must declare unconstitutional statutes *void*. By looking to dicta of United States Supreme Court decisions – in which our constitution was not at issue – this Court ignores the dictate of the people as set forth in the Georgia Constitution.

THE REMEDY STATUTE REPRESENTS THE PUBLIC POLICY OF THE STATE

8. By employing sweeping language in the remedy statute, OCGA § 48-2-35, the General Assembly made clear that *any and all* taxes which are erroneously or

illegally assessed and collected shall be refunded.[9] If the court denies a refund to a taxpayer who has successfully challenged the constitutionality of a taxing statute, then the Court has assumed that the remedy statute has no meaning. This is contrary to established law. "The courts of this state will not assume that the Legislature intended any provision of a statute to be without meaning." *Douglas County v. Anneewakee, Inc.*, 179 Ga.App. 270, 273, 346 S.E.2d 368 (1986).

The remedy statute represents the state's public policy to refund any and all taxes erroneously or illegally assessed and collected under state law. The statute includes taxes which are paid voluntarily and involuntarily, thus no element of duress is required nor must a protest be filed. The remedy statute is mandatory rather than directory, and it acts as a waiver of sovereign immunity. *Thompson v. Continental Gin Co.*, 73 Ga.App. 694, 37 S.E.2d 819 (1946).

Since the General Assembly intended to allow refunds under many different circumstances, it is incomprehensible that the taxpayer in the present case who successfully challenged the constitutionality of the taxing statute is barred from recovery. The key words of the

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[9] OCGA § 48-2-35 is entitled "Refunds." Subsection (a) provides: "A taxpayer *shall be refunded* any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner. . . . " (Emphasis supplied.)

remedy statute are *erroneously or illegally assessed and collected*. The majority indicates that the state had "no reason to believe that the import taxes were unconstitutional"; however, under the broad language of the statute it makes no difference that the state *erroneously* assessed and collected taxes under the unconstitutional statute. Erroneously assessed and collected taxes must be returned. Once the taxing statute was declared unconstitutional and *void*, there was no legal collection of these taxes, nor had there ever been one. Therefore, the state is illegally in possession of the taxpayer's property.

OTHER CONSTITUTIONAL PROVISIONS WHICH REQUIRE REPAYMENT

9. There are also constitutional provisions which require the return of unconstitutionally assessed and collected taxes. The state cannot deprive a person of property without due process of law. Georgia Constitution 1983, Art. I, Sec. I, Par. I. The due-process clause extends to every proceeding which may be a deprivation of "life, liberty, or property, whether the process be judicial or administrative or executive in its nature. [Cit.]" *Zachos v. Huiet*, 195 Ga. 780, 786, 25 S.E.2d 806 (1943). The assessment and collection of taxes in the absence of a valid taxing statute constitutes such an unconstitutional deprivation of property.

10. One of the paramount duties of government is to protect the property of its taxpayers. Georgia Constitution 1983, Art. I, Sec. I, Par. II. "It is the duty of the State government, through the instrumentality of the courts, to protect the property of a citizen and his right to possess and control it." *Irwin v. Willis*, 202 Ga. 463, 477, 43 S.E.2d

691 (1947). This Court must protect taxpayers who have had property erroneously or illegally taken under the auspices of an unconstitutional taxing statute by requiring the state to refund such illegally-collected taxes.[10]

The above constitutional provisions, all found in our Bill of Rights, were enacted to place limits on the government and to protect the people from governmental abuses. The government's authority to tax is powerful. In fact, in 1819 Chief Justice Marshall said:

> [That] the power to tax involves the power to destroy. . . . [is a] proposition[ ] not to be denied.

McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 431, 4 L.Ed. 579 (1819).

If this Court does not treat the unconstitutional statute as *void* from its inception, then nothing will deter the state from enacting other unconstitutional statutes and reaping the benefits therefrom. The constitutional mandate to declare the statute void, Ga. Constitution, 1983, Art. I, Sec. II, Par. V, is the taxpayer's protection from the power of the sovereign "to destroy." *McCulloch*, id.

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[10] An identical question is involved in *Marcus Collins v. Waldron and all Retired Federal Employees Similarly situated*, No. 47018 argued June 27, 1989. Retired federal employees challenged Georgia's scheme of taxation which taxes the retirement income of federal retirees while exempting the retirement income of state retirees as being unconstitutional. They argued, under the authority of *Davis v. Michigan Department of Treasury*, ___ U.S. ___, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989), that the Georgia scheme is unconstitutional and, therefore, the taxes were illegally collected.

This Court has placed a great deal of emphasis on the fact that the taxpayer in this case is a liquor company. It does not matter who the taxpayer is – a liquor company or an illegally taxed individual – the taxpayer is entitled to protection under the laws of this state. As former Supreme Court Justice Hugo Black said:

> Good men and bad men are entitled to trial and sentence in accordance with the law.

CONCLUSION

The constitutional mandate requiring this Court to declare the statute *void* has been ignored. The state's expressed public policy to refund taxes is thwarted just as the remedy statute, OCGA § 48-2-35, is trampled and, in reality, repealed by this Court. The majority's insistence upon declaring the statute *void* prospectively only,[11] while ignoring the Georgia Constitution, grants a hollow victory to the appellant who proved the taxing statute was unconstitutional. It also denies a remedy for the unlawful taking of the appellant's property, disregards the mandatory nature of the remedy statute, and sends the message to Georgia taxpayers that this Court will not protect their rights nor require the state to be accountable for taxes unconstitutionally and erroneously or illegally assessed and collected.

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[11] How can something be applied prospectively if it never existed? The doctrine of nonretroactivity may be used when dealing with a valid statute, law, case law, or a change in law or public policy. It does not apply and is not used in Georgia constitutional cases because the statute, case law, or public policy must, as required by our constitution and case law, be treated as if it never existed.

No. 89-680

In The

Supreme Court of the United States

October Term, 1989

JAMES B. BEAM DISTILLING CO.,

Petitioner,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE I. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Respondents.

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

When a taxpayer pays a state tax found to violate clearly established law under the Commerce Clause must the state provide some form of retroactive relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the state elect to provide only prospective relief?[1]

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[1] The issue presented here is identical to the issue disposed of by the Court in *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 58 U.S.L.W. 4665 (U.S. June 4, 1990) (No. 88-192). *McKesson* clearly established the taxpayer's right to some form of retroactive relief. The more narrow issue for review in this case is whether the state tax in question violated "clearly established law under the Commerce Clause."

LIST OF PARTIES AND RULE 29.1 LIST

The parties before the state courts and this Court are all listed in the caption.

James B. Beam Distilling Co. is a wholly owned subsidiary of American Brands, Inc., a Delaware Corporation. Petitioner has one less than wholly – owned subsidiary, which is DICO Holding Company, a Kentucky Corporation.

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OPINIONS BELOW

The opinion of the Supreme Court of Georgia in *James B. Beam Distilling Co. v. State of Georgia, et al.* is reported at 259 Ga. 363, 382 S.E.2d 95 (1989). The May 27, 1988, Final Order of the Superior Court of Fulton County, State of Georgia, is unreported.

JURISDICTION

The decision of the Supreme Court of Georgia sought to be reviewed was dated and entered on July 14, 1989.

The Order denying Petitioner's Motion for Rehearing before the Supreme Court of Georgia was dated and entered on July 26, 1989.

This Court granted Petitioner's Petition for Writ of Certiorari on June 11, 1990.

The jurisdiction of this Court to review the judgment of the Supreme Court of Georgia is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

Official Code of Georgia Annotated § 3-4-60 is set forth in an appendix to this Brief. App., *infra* at 1a. Section 3-4-60 was amended in 1985, and the statute in its amended form is set forth in Pet. App. 2a.

STATEMENT OF THE CASE

Introduction

Prior to 1985, Georgia law required Petitioner James B. Beam Distilling Company ("Petitioner" or "Beam"), as a condition to selling alcoholic beverages to Georgia wholesalers, to pay the applicable state excise taxes on sales of its alcoholic beverage products. O.C.G.A. § 3-4-60 (1982). Prior to 1985, section 3-4-60 of the Official Code of Georgia Annotated ("O.C.G.A.") taxed locally produced

"distilled spirits" at $.50 per liter and locally produced alcohol at $.70 per liter, while taxing their counterparts manufactured outside Georgia at $1.00 and $1.40 respectively. Joint Appendix ("J.A.") at p. 18. In 1982, Beam paid taxes pursuant to O.C.G.A. § 3-4-60 in the amount of $649,000; in 1983 in the amount of $857,000; and in 1984 in the amount of $894,000. J.A., p. 6, ¶¶ 13-16. Therefore, the total of the taxes improperly levied against Beam during the years in question amounts to $2,400,000.[1]

In the trial court below, Beam alleged that O.C.G.A. § 3-4-60 constituted an unconstitutional infringement upon interstate commerce and that Beam therefore was entitled to a refund of the taxes illegally levied and collected. *See generally* Petitioner's Complaint, J.A., pp. 2-9. On May 27, 1988, the Superior Court of Fulton County, State of Georgia, entered its order declaring unconstitutional O.C.G.A. § 3-4-60, as codified during the years in question on appeal – 1982, 1983 and 1984 (the "pre-*Bacchus* statute"). However, the trial court refused to apply its decision retroactively. Thus, the trial court declined to order a refund of the taxes Beam had paid pursuant to the illegal statute. J.A., pp. 29-30, ¶ 9. A true

[1] Georgia has, in effect, a three year statute of limitations on claims for refunds of taxes improperly or illegally assessed. *See* O.C.G.A. § 48-2-35(a)(5). O.C.G.A. § 3-4-60 was amended after this Court's decision in 1984 in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). The amended statute has been held constitutional by the Georgia Supreme Court. *See infra*. Therefore, Beam sought a refund in this case of only those taxes paid during the three year period prior to the 1985 revision of the statute.

and correct copy of the court's order is contained in the parties' Joint Appendix at pp. 19-31. The Supreme Court of Georgia affirmed the order of the trial court in all respects and the case is now before this Court on writ of certiorari.

Factual Background

As stated above, prior to 1985, the State of Georgia imposed a tax upon imported alcoholic beverages at twice the rate for the same beverages produced in Georgia from Georgia-grown products. The pre-*Bacchus* statute provided:

> The following state excise taxes are levied and imposed:
>
> (1) On the importation of all distilled spirits imported into this state, a tax of $1.00 per liter and on all alcohol imported into this state, a tax of $1.40 per liter, and a proportionate tax at the same rate on all fractional parts of a liter;
>
> (2) On the manufacture of all distilled spirits manufactured in this state from Georgia-grown products, a tax of $.50 per liter and on all alcohol manufactured in this state from Georgia-grown products, a tax of $.70 per liter, and a proportionate tax at the same rate on all fractional parts of a liter.

O.C.G.A. § 3-4-60 (1982), J.A., p. 18.

In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) ("*Bacchus*"), this Court struck down as unconstitutional a tax imposed by the State of Hawaii identical in its discriminatory effect to O.C.G.A. § 3-4-60. The Hawaii statute imposed a twenty percent tax on sales of liquor at wholesale; however, certain alcoholic beverages made

from locally grown products were exempted from the tax. 468 U.S. at 265. This Court held that the Hawaii tax was discriminatory and unconstitutional on its face.

After this Court's 1984 decision in *Bacchus*, the Georgia Legislature recognized that the constitutional infirmity in Georgia's own statute was undeniable. Nevertheless, the local liquor industry in Georgia went to work behind the scenes in an attempt to preserve the preferential treatment effected through the pre-*Bacchus* statute. For example, attorneys at the Atlanta law firm, King & Spalding, including Georgia's former governor, George Busbee, represented certain vested local liquor interests. The attorneys wrote a letter to Georgia's incumbent Governor Joe Frank Harris. The attorneys noted pointedly that "the purpose of the act [the pre-*Bacchus* statute] was to promote manufacture of liquor and wine in Georgia with Georgia products." Exhibit "A-10" to Beam's Motion for Summary Judgment, Georgia Supreme Court Record (S.R.) at p. 30. The letter also outlined several reasons for maintaining the pre-*Bacchus* tax treatment. One of these was to "[c]ontinue [the] long-standing policy of [the] state not to penalize or increase revenue laws against businesses which have local facilities in the state." S.R. at p. 33. Another reason given to maintain the "status quo" was to avoid wiping out the "incentives given for Georgia industries after millions have been invested in reliance on longstanding public policy and revenue laws . . . . " *Id.* Another reason: "Do not let U.S. Supreme Court change state public policy." *Id.*

Following *Bacchus* and the efforts of Georgia's vested local liquor interests, the Georgia Legislature in 1985 enacted certain superficial changes to O.C.G.A. § 3-4-60 (the "post-*Bacchus* statute"). The changes were made in a

transparent attempt to conform the very same statutory scheme to this Court's decision in *Bacchus* without making any substantive change to the statute, its intent or effect. The approach taken by the Georgia Legislature in the post-*Bacchus* statute is to tax the *importation* rather than the *sale* of imported beverages (the "import approach"). The Legislature hoped in that way to preserve the protectionist scheme since the Twenty First Amendment gives the states broad authority to regulate the "importation" of alcoholic beverages. However, the purpose and effect remain the same, as David Runnion (Senior Assistant Attorney General of Georgia) observed in a Georgia Department of Law interoffice memo:

> The distinction . . . to extract from *Bacchus* regarding state control over 'importation' of alcohol has substantial merit in a purely regulatory context. Here, where the real desire *even in the new legislation* [amended § 3-4-60] is to favor local alcohol industries, I do not feel it would be a winning argument. It is not a superficial argument, but I rate its chances of success in the federal courts as very slim. In light of the way in which the U.S. Supreme Court is headed at the moment, it is my opinion that the only way to completely assure no revenue loss to the state in this area is to amend the foregoing two statutes to impose equal tax rates on all alcoholic beverages.

S.R. at p. 27 (emphasis supplied). Although the Georgia Department of Law was on public record that the "import approach" was invalid under *Bacchus* (S.R. at p. 13, Runnion handwritten notes), the Georgia Legislature at the urging of local liquor lobbyists failed to heed Mr. Runnion's advice. Instead the Georgia Legislature apparently gave in to what Mr. Runnion described as a "strong move

afoot to try [the import approach] out in the courts . . . and see if the local break can be saved." S.R. at p. 13 (handwritten notes).

The pre-*Bacchus* statute and the post-*Bacchus* version of it are set forth in Appendix 1a and 2a, respectively, to the Petitioner's Brief. Obviously, the changes effected by the Georgia Legislature in 1985 were purely cosmetic, and not unlike those changes recently rejected by this Court in *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 58 U.S.L.W. 4665 (U.S. June 4, 1990) (No. 88-192). The pre-*Bacchus* statute had imposed a tax on the importation of all distilled spirits and alcohol into the State at twice the rate of the taxes imposed on the same items when manufactured in Georgia and made from Georgia-grown products. The post-*Bacchus* statute taxes these goods based on the volume of alcoholic beverages sold.

The discrimination against out-of-state producers is achieved by splitting the taxes into two portions. One portion of the "new" tax consists of an "excise" tax imposed on all alcoholic beverages wherever produced. The second portion of the tax is imposed only on out-of-state products as an "import" tax, *i.e.*, the "import approach."

The continued discriminatory effect of the post-*Bacchus* statute is illustrated through the following example. Like their Georgia-produced counterparts, distilled spirits produced outside of the State of Georgia bear an "excise" tax of fifty cents per liter. A liter of the same beverage produced outside of the State of Georgia not

only bears the $.50 excise tax, but further bears an additional "import" tax of fifty cents. Thus, the liter of distilled spirits produced in Georgia bears only the "excise" tax of $.50; the liter of distilled spirits produced outside of Georgia bears a total tax of one dollar.

In the self-serving preamble to the Act enacting the post-*Bacchus* statute, the Georgia Legislature disclosed a newfound statutory purpose: "to provide for the increased cost of administration and collection of revenues; to aid in the exercise of the police power; to promote temperance . . . . " Ga. L. 1985, p. 665. Section 1 of the 1985 Act states:

> [T]he General Assembly finds and determines the cost of regulating and administering the manufacture, distribution, and sale of alcohol, distilled spirits, table wines, and dessert wines consumed in this state is greater for imported alcohol, distilled spirits, table wines, and dessert wines produced within this state and further finds and determines that it is in the best interest of the citizens of this state that the increased costs be provided for by taxation.

Ga. L. 1985, p. 665; *Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E. 2d 190, 195 (1987), *appeal dismissed*, 107 S.Ct. 3253 (1987). Clearly the Legislature took a rather backward approach in drafting a purpose provision to fit the Act.

Petitioner proved in the trial court that the purpose and effect of the pre-*Bacchus* statute were to discriminate against out-of-state producers of alcoholic beverages and unfairly to promote local commerce in the form of in-state producers. Finding as a matter of law that the purpose *and* the effect of the statute were to protect alcoholic beverages made with Georgia-grown products from out-of-state competition, the trial court held the statute

unconstitutional under the Commerce Clause of the United States Constitution, Article 1, Section 8, clause 3 (the "Commerce Clause"). (The Commerce Clause is set forth in Appendix 3a to Petitioner's Brief.)

At paragraph 5 of its order granting summary judgment, the trial court stated:

> This Court further holds that the purpose of O.C.G.A. § 3-4-60, as it existed during the years in question, was economic protectionism, *i.e.*, to benefit local business and local industry. This purpose is indicated by the legislative history, 1937-38 Ga. Laws Ex. Sess. 115, 117 (alcohol and distilled spirits).
>
> * * *
>
> The protectionist purpose of the statute is further indicated by the Exhibits "A-3" through "A-13" produced by the plaintiff [Petitioner] in opposition to the defendants' [Respondents'] Motion for Summary Judgment and produced to plaintiff by the defendants pursuant to this Court's Order of December 3, 1987.
>
> "Examination of the State's purpose in this case is sufficient to demonstrate the State's lack of entitlement to a more flexible approach permitting an inquiry into the balance between local benefits and the burden on interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)." *Bacchus*, 468 U.S. at 270.

J.A., pp. 26-27.[2] The Superior Court declined, however, to apply its decision retroactively so as to provide Beam

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[2] The Exhibits "A-3" through "A-13" to which the trial court made reference consist of documents produced by the State to Beam pursuant to a discovery order of the trial court. Some of the exhibits are referenced at pp. 5-8, *supra*.

with any remedy for the effect of the offending statute. J.A., pp. 29-30, ¶¶ 8-9.

On appeal the Georgia Supreme Court agreed that the pre-1985 statute was constitutionally deficient and upheld the trial court's rulings in all respects. J.A., p. 101, section 1. The court stated, "The statute imposed higher taxes on out-of-state products solely because of their origin. The record demonstrates that the purpose and effect of the statute was [sic] simple economic protectionism, which is virtually per se invalid under the Commerce Clause of the U.S. Constitution." *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 364, 382 S.E.2d 95, 96 (1989) (citation omitted).

Beam does not challenge the Georgia Supreme Court's ruling that the statute was unconstitutional. However, the Georgia Supreme Court also endorsed the trial court's holding that the ruling as to unconstitutionality would be given prospective application only so as to deny Beam a refund of the taxes it had paid under the defective pre-*Bacchus* statute. Rather than apply the strict letter of a Georgia statute mandating a refund,[3] the

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[3] O.C.G.A. § 48-2-35 (Appendix 4a) provides, in pertinent part, as follows: "(a) a taxpayer *shall be refunded* any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state . . . . " (emphasis supplied). As noted in *Bacchus, supra*, 468 U.S. at 277, n. 14, "it may be, for example, that given an unconstitutional discrimination, a full refund is mandated by state law." However, the Georgia Supreme Court, noting "at least two other lawsuits currently pending in which other alcohol producers seek over $28,000,000 in tax refunds . . . . " (J.A., p. 103), declined a literal application of the statute so as to deny the Petitioner the relief mandated by the statute.

Georgia Supreme Court applied the criteria prescribed by this Court in *Chevron Oil v. Huson*, 404 U.S. 97 (1971) ("*Chevron Oil*"), so as to avoid the retroactive application of its decision.

Beam then filed its Petition for Writ of Certiorari on October 16, 1989. This Court granted the Petition in the wake of its rulings in *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 58 U.S.L.W. 4665 (U.S. June 4, 1990) (No. 88-192) and *American Trucking Associations, Inc. v. Smith*, 58 U.S.L.W. 4704 (U.S. June 4, 1990) (No. 88-325). These cases resolved issues related to those presented in the instant appeal.

SUMMARY OF THE ARGUMENT

Official Code of Georgia Annotated § 3-4-60 effected a scheme which taxed liquor manufactured from products grown outside the State of Georgia at twice the rate of the tax applied to liquor grown from in-state products. The tax was ruled unconstitutional by the Supreme Court of Georgia in the wake of this Court's decision in *Bacchus Imports, Ltd. v. Diaz*, 468 U.S. 263 (1984). Moreover, the Supreme Court of Georgia sustained the trial court's factual finding that the statute had been enacted solely for the purpose of insulating Georgia's domestic liquor industry from interstate competition. In 1985 the Georgia Legislature implemented superficial changes in the statute in an effort to preserve Georgia's tax break for its domestic liquor industry and in direct defiance of the principles established by this Court in *Bacchus* and its

predecessor decisions. However, the purpose and effect of the statute remain the same.

Petitioner James B. Beam Distilling Company ("Beam") paid taxes totalling $2,400,000 during the three year period prior to the amendment of the statute. In the trial court Beam sought to recoup these payments, which were definitively declared constitutionally invalid in *Bacchus*. Both the trial court and the Supreme Court of Georgia ruled the statute unconstitutional, yet failed to grant Beam a refund of the taxes paid by applying their decisions prospectively only. Thus, the issue before this Court is whether the Georgia courts' failure to grant the Petitioner a refund violates the due process principles established in the recent case of *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 58 U.S.L.W. 4665 (U.S. June 4, 1990) (No. 88-192) ("McKesson"). *McKesson* confirmed a taxpayer's right to retroactive relief when the taxpayer has been compelled by state law to pay taxes based upon a statute that unconstitutionally discriminates against out-of-state manufacturers, and *McKesson* requires a refund by the State in this instance as well.

Since the taxes here were paid prior to this Court's ruling in *Bacchus*, the Georgia courts sought to avoid a refund by refusing to give retroactive application to the *Bacchus* decision. However, a decision of nonretroactivity requires the application of the three criteria established by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The *Chevron Oil* criteria clearly militate against nonretroactive application. Therefore the Court should apply the *Bacchus* decision in its customary manner, *i.e.*, retroactively.

The first criterion under *Chevron* requires that before the Court will consider non-retroactive application it must be established that the decision to be applied either overruled clear past precedent or decided an issue of first impression whose resolution was not clearly foreshadowed. The *Bacchus* decision did not overrule *any* past precedent. Rather, *Bacchus* represented the culmination of a long line of case authority proscribing protectionist measures implemented by the states in violation of the Commerce Clause of the United States Constitution. "It has long been the law that states may not 'build up [their] domestic commerce by means of unequal and oppressive burdens upon the industry and business of other states.' *Guy v. Baltimore*, 100 U.S. 434 (1880)." *Bacchus*, 468 U.S. at 272-273.

In the wake of the passage of the Twenty-First Amendment, this Court issued certain decisions implying that the states were unfettered by the Commerce Clause when regulating in the area of alcoholic beverages. However, long before the taxes sought to be refunded in this case were paid, this Court made clear that where the animus of state legislation is pure economic protectionism, not even the sanction of the Twenty-First Amendment can save the offending statue. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964). Thus, not only did *Bacchus* not overrule any prior precedent, its coming was foreordained as early as 1964.

Where the first *Chevron Oil* criterion is not met, there is no occasion to consider the remaining two criteria, and a decision is applied retroactively. Even so, the remaining

criteria militate strongly against nonretroactivity. First, the second criterion requires that the Court determine whether retroactive application will advance the purpose of the rule in question – in this case the Commerce Clause. The central purpose of the Commerce Clause is to promote interstate commerce and break down protectionist barriers to that commerce. Retroactive application in this case would restore some of the competitive balance distorted by the State of Georgia when it erected barriers to competition from outside its borders. Moreover, this Court has specifically recognized intransigence in the application of its decisional principles as a valid consideration when considering nonretroactivity. In the instant case, rather than seek to comply with this Court's decision in *Bacchus*, Georgia deliberately sought to evade the principles established in that case.

Finally, *Chevron Oil* requires that the Court consider any inequity that would result from retroactive application. However, this Court has also noted that the inequity posed by the possibility of burdening a state's financial operations may be "largely irrelevant" where the State "violates constitutional norms well established under existing precedent." In this case, Georgia continued to violate those constitutional norms long after the State had any right to assume that its protectionist scheme was constitutional.

ARGUMENT

I. WELL-ESTABLISHED PRINCIPLES OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT DICTATE THAT BEAM IS ENTITLED TO A CLEAR AND CERTAIN BACKWARD-LOOKING REMEDY

Although the Georgia Supreme Court agreed that the purpose and effect of the pre-*Bacchus* statute constituted simple economic protectionism, the court nevertheless declined to grant Beam a remedy. This issue can only be analyzed in the light of a recent decision of this Court just prior to the Court's grant of Beam's Petition for Writ of Certiorari. In *McKesson v. Division of Alcoholic Beverages and Tobacco*, 58 U.S.L.W. 4665 (U.S. June 4, 1990) (No. 88-192) ("*McKesson*"), the Court clearly established a taxpayer's right to retroactive relief when the taxpayer has been compelled by state law to pay taxes to the state based upon a statute that unconstitutionally discriminates against out-of-state manufacturers. The facts and issues in *McKesson* bear a striking resemblance to those of the instant case.

In *McKesson*, the State of Florida had, prior to *Bacchus*, passed a statute for the purpose of taxing the sale of certain alcoholic beverages that was very similar to the Hawaii statute struck down in *Bacchus*. After *Bacchus*, the Florida Legislature passed a new statute, which was at issue in *McKesson*. As in the instant case, the state courts in *McKesson* held the statute at issue to be unconstitutional under the Commerce Clause. The state courts nevertheless refused to grant the taxpayer any retrospective relief. This Court framed the issue before it to be

"whether federal law entitles [the petitioner] to a partial tax refund." *McKesson, id.*, 58 U.S.L.W. at 4667.

Turning to that issue, the Court held that "if a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *Id.*, 58 U.S.L.W. at 4668-69 (footnotes omitted). As is allowed under the Due Process Clause, Florida had declined to provide any pre-deprivation process for the exaction of taxes, establishing instead "various sanctions and summary remedies designed so that liquor distributors tender tax payments *before* their objections are entertained and resolved." *Id.*, 58 U.S.L.W. at 4670 (emphasis in original, footnote omitted). Holding that to mean that Florida "requires taxpayers to raise their objections to the tax in a post-deprivation refund action," the Court then held that "in this refund action the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy' . . . for any erroneous or unlawful tax collection to ensure that the opportunity to contest the law is a meaningful one." *Id.*, 58 U.S.L.W. at 4671 (footnote and citation omitted). The Court then held that the State could not, consistent with the Due Process requirements of the Fourteenth Amendment, refuse to grant the petitioner retroactive relief in the refund proceeding. *Id.*, 58 U.S.L.W. at 4672.

In reaching its conclusion in *McKesson*, the Court drew upon a long line of well-settled authority reaching

back to *Atchison, Topeka, & Santa Fe RY Co. v. O'Connor*, 223 U.S. 280 (1912) ("*O'Connor*"). In that case the Court stated, "It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy." *Id.*, 223 U.S. at 285. In addressing the argument that the State of Colorado should not be required to repay money already in its treasury, Justice Holmes referred to a Colorado statute very similar in operation to the Georgia refund statute implicated in the instant case, O.C.G.A. § 48-2-35. Justice Holmes stated, "It would seem that the statute contemplated the course taken by the plaintiff and provided against any difficulty in which the Secretary of State otherwise might find himself in case of a disputed tax." *Id.*, 223 U.S. at 287. The Court held that the State was required to refund to the plaintiff the taxes illegally paid.

In *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928), the Court held that invalidation of a taxing statute after the tax had been paid was insufficient. The State was also required to give the taxpayer a retrospective remedy. "Plaintiff in Error cannot be deprived of its legal right to recover the amount of the tax unlawfully exacted of it by the later decision which, while repudiating the construction under which the unlawful exaction was made, leaves the monies thus exacted in the public treasury." *Id.*, 276 U.S. at 504-05.

In *Carpenter v. Shaw*, 280 U.S. 363 (1930), the Court made clear that the State's obligation to repay taxes paid under duress arises out of the Fourteenth Amendment. In that case, the State had argued that it was not required to repay the tax, because it alleged that the tax was paid on an untimely basis. The taxpayer responded that he had

paid the tax under compulsion to prevent, among other things, the "accumulation of statutory penalties." *Id.*, 280 U.S. at 369. The Court held that a "denial by state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." *Id.*

The instant case finds itself on all fours with the facts of *McKesson* and the holdings of the cases upon which the Court relied in *McKesson*. Beam paid the taxes required of it without any meaningful pre-payment process available. Beam was required either to pay the tax pursuant to the pre-*Bacchus* statute or it could not sell its products in the State of Georgia. O.C.G.A. § 3-4-61(2). When Beam then pursued the post-deprivation remedy ostensibly provided to it under O.C.G.A. § 48-2-35, the State of Georgia simply ignored the request for a refund until Beam sought relief in the Georgia courts. J.A., pp. 7-8, ¶¶ 18-20. Even there, the State of Georgia sought to avoid the constitutional requirement of a "clear and certain remedy" by maintaining that *Bacchus* should not be applied retroactively.[4]

Under the line of authority cited in *McKesson* which dates as far back as 1912, seventy-two years before this Court's decision in *Bacchus*, it is clear that federal due

[4] The State of Florida and the Florida courts contended in *McKesson* that the decision holding the statute at issue to be unconstitutional should have been applied prospectively only. A plurality of this Court rejected that notion, stating in *American Trucking Associations, Inc. v. Smith*, 58 U.S.L.W. 4704, 4708 (U.S. June 4, 1990) (No. 88-325; ("*ATA*"), decided by this Court on the same day as *McKesson*, that *McKesson* "involved only the application of settled Commerce Clause precedent."

process principles require Georgia to develop a post-deprivation procedure so as to provide a "clear and certain remedy" for the deprivation of tax monies in an unconstitutional manner. These precedents estabish beyond doubt that Beam is entitled to postpayment, or retrospective relief for having paid taxes pursuant to a tax scheme which was ultimately found unconstitutional.

This conclusion is easily reachable without going further in analysis and without trundling out the *Chevron Oil* test of nonretroactivity relative to *Bacchus*. Under *McKesson*, Beam is entitled to retrospective relief for having paid the taxes at issue pursuant to a constitutionally invalid statute.

II. UNDER THE CRITERIA ESTABLISHED BY THE COURT IN *CHEVRON OIL*, *BACCHUS* SHOULD BE APPLIED RETROACTIVELY

The Supreme Court of Georgia justified the denial of a clear and certain remedy for Beam on the stated basis that its decision should not be applied retroactively. Apparently referring to this Court's decision in *Bacchus* rendered on June 29, 1984, the Georgia Supreme Court stated, "Applying the first prong of the *Chevron* test we note that the decision does not now [July 14, 1989] establish a 'new rule.' However, if the decision had been rendered during 1984, the last year that the tax was assessed, it would certainly have overruled past precedent." *James B. Beam Distilling Co. v. State, supra*, 259 Ga. at 365, 382 S.E.2d at 96. Thus, the Georgia Supreme Court acknowledged that *Bacchus* was sufficiently controlling as of June 29, 1984 to establish that the pre-*Bacchus* statute

was unconstitutional. In deciding the retroactivity issue before the Court in the instant case, this Court must decide whether *Bacchus* is to be given retroactive application.

On the issue of non-retroactive application of decisional law, the analysis must start with the "usual rule . . . that federal cases should be decided in accordance with the law existing at the time of decision." *Saint Francis College v. Al-Khazraji*, 107 S.Ct. 2022, 2025 (1987) (citing *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n. 16 (1981); *Thorpe v. Durham Housing Authority*, 393 U.S. 268, 281 (1969); *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801)). *See also Rodriguez de Ouijas v. Shearson/American Express, Inc.*, 109 S.Ct. 1917, 1922 (1989) (referring to "the customary rule of retroactive application").

This Court decided a second pertinent case shortly before granting Beam's Petition for Writ of Certiorari. *American Trucking Associations, Inc. v. Smith*, 58 U.S.L.W. 4704 (U.S. June 4, 1990) (No. 88-325) ("*ATA*"), decided by this Court on the same day as *McKesson*, addresses the issue of when a decision of the Supreme Court is to be applied prospectively only. In *ATA*, certain of the taxes at issue were paid prior to this Court's decision in *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266 (1987) ("*Scheiner*"). In *Scheiner*, the Court had held similar taxes to be unconstitutional. As in *McKesson* and the instant case, the taxes paid in *ATA* were held to penalize out-of-state entities in violation of the Commerce Clause. Since some of the taxes at issue in *ATA* were paid prior to *Scheiner*, and since prior holdings of the Court would

have supported the constitutional validity of the tax under the Commerce Clause, the question before the Court was whether to apply *Scheiner* retroactively. Using the criteria established in *Chevron Oil, supra*, 404 U.S. 97 (1971), a plurality of the Court in *ATA* declined to give *Scheiner* retroactive application. The Court thereby held that ATA was not entitled to any remedy for taxes paid prior to *Scheiner*. The Court's plurality opinion stated, "In sum, we conclude that applying *Scheiner* retroactively would 'produce substantial inequitable results.' *Chevron Oil*, 404 U.S. at 107." *ATA, supra*, 58 U.S.L.W. at 4709.[5]

As in *ATA*, the question before the Court here is whether the Georgia Supreme Court properly applied the three-pronged test set forth in *Chevron Oil* in determining whether or not its decision on the pre-*Bacchus* statute and *Bacchus* should be given retroactive application. If the constitutional decision below and *Bacchus* were to be given prospective application only, then Beam would have paid without recourse $2,400,000 pursuant to the unconstitutional pre-*Bacchus* statute. If the constitutional decision below and *Bacchus* are applied retroactively, then the State of Georgia must provide Beam with a clear and certain remedy consistent with the holding of this Court in *McKesson*.

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[5] Concurring in the judgment of the Court in *ATA*, Justice Scalia stated that "[s]ince the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense." *ATA, supra*, 58 U.S.L.W. at 4714.

"The determination whether a constitutional decision of this Court is retroactive – that is, whether the decision applies to conduct or events that occurred before the date of the decision – is a matter of federal law." *ATA, supra,* 58 U.S.L.W. at 4707. In *ATA,* the plurality of the Court reiterated the *Chevron Oil* test:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent *on which litigants may have relied,* or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, . . . we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we [must] weig[h] the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity." 404 U.S., at 106-107 (citations and internal quotations omitted).

ATA, supra, 58 U.S.L.W. at 4707-08 (emphasis supplied). Applying these principles leaves little doubt that Beam is entitled to the type of retrospective remedy described in *McKesson.*

A. *Bacchus* Did Not Establish a New Principle of Law, Either by Overruling Clear Past Precedent or by Deciding an Issue of First Impression Whose Resolution was not Clearly Foreshadowed

The instant case contrasts sharply with *ATA.* In *ATA* the Court easily determined that *Scheiner* met the first of the three-pronged *Chevron Oil* criteria because it overruled prior precedent upon which the Arkansas Legislature may have relied in establishing the taxing scheme ruled unconstitutional in *Scheiner.* "We think it obvious that *Scheiner* meets the first test of nonretroactivity. Both the majority and dissent in that case recognized that the Court's decision left very little of the *Aero Mayflower* line of precedent standing." *ATA, supra,* 58 U.S.L.W. at 4708.

Bacchus did not overrule any prior precedent. *Bacchus* simply affirmed longstanding Commerce Clause doctrine prohibiting state legislatures from implementing legislation purely to benefit local interests while impeding the flow of interstate commerce. "It has long been the law that States may not 'build up [their] domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States.' *Guy v. Baltimore,* 100 U.S. 434, 443 (1880)." *Bacchus,* 468 U.S. at 272-73.

This Court stated the principle controlling the constitutionality of the pre-*Bacchus* statute as early as 1977: "No State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' " *Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318, 329 (1977) ("*Boston Stock Exchange*") (quoting *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 458 (1959)). Applying this well-established and "cardinal" rule to the statute at issue in *Bacchus,* this Court easily found the *Bacchus* statute to be unconstitutional. *See Bacchus, supra,* 468 U.S. at 268, (quoting *Boston Stock Exchange*).

The Court then rejected the implication that the Twenty-First Amendment validated the otherwise invalid tax:

> The State contends that a more flexible approach, taking into account the practical effect and relative burden on interstate commerce, must be employed in this case because (1) legitimate state objectives are credibly advanced, (2) there is no patent discrimination against interstate trade, and (3) the effect on interstate commerce is incidental. See *Philadelphia v. New Jersey*, 437 U.S. 617, 624, (1978). On the other hand it acknowledges that where simple economic protectionism is effected by state legislation, a stricter ruler of invalidity has been erected. *Ibid.* See *also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471, (1981); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36-37, (1980).

Id., 468 U.S. at 270. Moreover, "[e]xamination of the State's purpose in this case is sufficient to demonstrate the State's lack of entitlement to a more flexible approach permitting inquiry into the balance between local benefits and the burden on interstate commerce. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)." *Id.* at 271. Further:

> No one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry. However, the Commerce Clause stands as a limitation on the means by which a state can constitutionally seek to achieve that goal. One of the fundamental purposes of the Clause "was to ensure . . . against discriminating State legislation." *Welton v. Missouri*, 91 U.S. 275, 280 (1876).

Id. As in *Bacchus*, this case presents no dispute as to the State's motivation of economic protectionism in enacting the offending statute.

Not only was this "strict scrutiny" rule clearly established by 1982 (the tax year first in question in the instant case), but the standard under which simple economic protectionism was to be determined was clearly established. Economic protectionism could be established by either discriminatory purpose or discriminatory effect. *See Minnesota v. Clover Leaf Creamery Co., supra*, 449 U.S. 457, 471 n. 15 (1981); *Philadelphia v. New Jersey, supra*, 437 U.S. 617, 624 (1978); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977). *See also Bacchus, supra*, 468 U.S. at 270. (relying upon the cases cited herein). Under this clear line of authority, the State of Georgia simply cannot contend that it relied in good faith upon the precedent of this Court in believing in 1982, 1983 and 1984 that the pre-*Bacchus* statute was constitutional.[6]

The cases decided pursuant to the Twenty-First Amendment to the Constitution upon which the State would rely do not vary the Commerce Clause jurisprudence discussed above. Had the pre-*Bacchus* statute been challenged in 1940 rather than in the latter part of the Twentieth Century, the State would have had a better

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[6] Without even attempting to analyze the case law of this Court under the Twenty-First Amendment and the Commerce Clause, the Georgia Supreme Court relied upon its own 1939 decision upholding the constitutionality of the forerunner of the pre-*Bacchus* statute. *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 365, 382 S.E. 2d 95, 96 (1989) (citing *Scott v. State*, 187 Ga. 702, 2 S.E. 2d 65 (1939), *overruled on other grounds, Blackston v. Georgia Department of Natural Resources*, 225 Ga. 15, 334 S.E.2d 679 (1985)). Solely because of the Georgia Supreme Court's own ruling in *Scott* did the court decide that *Bacchus* met the first of the *Chevron Oil* criteria for non-retroactivity.

argument that the Twenty-First Amendment validates the otherwise unconstitutional pre-*Bacchus* statute. This argument became patently wrong long before Beam paid the taxes at issue in the instant case.

Referring to decisions of this Court decided within the early years following ratification of the Twenty-First Amendment, this Court held in 1964 that to "draw a conclusion from this line of decisions that the Twenty-First Amendment was somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964). Thus, early suggestions in dicta that the Twenty-First Amendment left states unfettered by the Commerce Clause when dealing with intoxicating liquors could no longer be relied upon. *See, e.g., Indianapolis Brewing Co. v. Liquor Control Comm'n of State of Michigan*, 305 U.S. 391, 394 (1939) (stating that "the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause. . . . "); *Joseph S. Finch & Co. v. Burk*, 305 U.S. 395 (1939) ("Since that [A]mendment, the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause."); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939) ("The Twenty-First Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause."); *Mahoney v. Joseph Triner Corporation*, 304 U.S. 401, 403 (1938) ("That under the [Twenty-First A]mendment discrimination against imported liquor is permissible although it is not an incident of reasonable regulation of the liquor traffic, was

settled by [*Young's Market*]."); and *State Board of Equalization of California v. Young's Market Co.*, 299 U.S. 59 (1936) ("*Young's Market*") (upholding a license fee of $500 for the privilege of importing beer into the State of California despite the Court's conclusion that "[p]rior to the Twenty-First Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege.").

By 1945, the broad-sweeping notion that the Twenty-First Amendment left the States unfettered by the Commerce Clause had been squarely rejected. In *United States v. Frankfort Distilleries*, 324 U.S. 292 (1945), the Court considered whether the Sherman Act, 15 U.S.C. §§ 1, *et seq.*, promulgated by Congress pursuant to the Commerce Clause, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980), could apply to conduct affecting commerce in alcoholic beverages. Without difficulty, the Court held that the Twenty-First Amendment did not preclude application of the Sherman Act to commerce involving intoxicating beverages. Thus, the Commerce Clause indisputably placed limitations upon the states' powers in regulating commerce in alcohol despite the Twenty-First Amendment.

In 1964, the Court again grappled with the tension between the federal and state governments when regulating the flow of alcoholic beverages in commerce. In *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964), the Court expressly held that the Twenty-First Amendment does not override the Export-Import Clause of the United States Constitution, Article I, Section 10, clause 2. Thus, the State could not constitutionally

place a direct tax on intoxicating beverages coming into its territory from abroad.

On the same day in 1964, the Court considered whether the State of New York could prohibit a retailer at an international airport from selling alcoholic beverages in contravention of the State's laws regarding such retail sale. As stated above, the Court expressly acknowledged the early line of cases under the Twenty-First Amendment and the broad language contained in them. The Court left no doubt, however, that the Twenty-First Amendment did not leave the States unfettered by the Commerce Clause, characterizing as "absurd" the conclusion that the Twenty-First Amendment had repealed the Commerce Clause "wherever regulation of intoxicating liquors is concerned." *Idlewild, supra*, 377 U.S. 324, 331-32 (1964). The Court went on to explain that "[b]oth the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete sense." *Id.*[7]

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[7] In point of fact, this Court decided long ago that these broad-sweeping proclamations constituted dicta in the cases in which they were made. As early as 1938 in *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938), the Court held that "Where exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable." Likewise in *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939), the Court found no substance in the argument that Congress no longer had the

(Continued on following page)

Accordingly, by 1964, the broad-sweeping language of the early Twenty-First Amendment cases which may have appeared to release the States from Commerce Clause scrutiny with respect to issues impacting trade in intoxicating liquors had been overruled by this Court. Either the Court viewed the broad language from the prior cases to constitute dicta only, or the Court had flatly overruled their holdings.[8]

(Continued from previous page)

authority after the ratification of the Twenty-First Amendment to control importation of alcoholic beverages into the United States under the Federal Alcohol Administration Act.

[8] In *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), the Court reaffirmed what it had held in *Idlewild*. "[The second section of the Twenty-First Amendment has not operated totally to repeal the Commerce Clause in the area of the regulation of traffic in liquor." *Id.* at 42. In that case, the Court considered New York's statute requiring liquor suppliers to affirm that their posted prices were at least as low as prices charged in other states during the previous month. The Court held that the statute did not violate the Commerce Clause. Because the statutory scheme had not yet been put into effect, the Court considered the constitutional validity of the scheme on its face only. *Id.* at 41.

In *Brown-Forman Distillers Corp v. New York State Liquor Authority*, 476 U.S. 573 (1986), the Court struck down a scheme that was similar to the one considered in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966). The controlling difference between the two statutes was that the statute at issue in *Brown-Forman* prohibited the suppliers from changing their prices in other states without amending their affirmations to reflect the change. *Brown-Forman, supra*, 476 U.S. at 581. *See also Healy v. The Beer Institute, Inc.*, 109 S.Ct. 2491 (1989) (striking down a similar Connecticut statute on grounds similar to the Court's analysis in *Brown-Forman*).

Between 1966 and 1982, the first year of taxation at issue in the instant case, the Court had occasion to address the limitations of the Twenty-First Amendment with respect to other constitutional provisions. In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the Court struck down under notions of Fourteenth Amendment due process a state law that allowed state officials to post publicly the names of persons with a history of alcohol problems without first affording those persons an opportunity for notice and a hearing. The Court thus affirmed that the Twenty-First Amendment did not pro tanto repeal other provisions of the Constitution with respect to issues impacting intoxicating liquors.

In *California v. LaRue*, 409 U.S. 109 (1973) (*"LaRue"*), the Court considered State regulations that restricted certain "lewd" behavior on premises licensed to sell liquor by the drink. *LaRue* clearly involved the police power of the State. The State promulgated the regulations in question in response to findings that the lewd behavior practiced at certain establishments where liquor by the glass was served led to violent and criminal behavior. The Court stated, "While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-First Amendment has been recognized as conferring something more than the normal state authority *over public health, welfare, and morals." Id.*, 409 U.S. at 114 (emphasis supplied). The Court acknowledged that the early Twenty-First Amendment cases "did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions

of the United States Constitution in the area of liquor regulations."

In this context, the Court upheld California's regulations against a First Amendment challenge under a rational basis analysis. Because of the interplay of the First Amendment and the Twenty-First Amendment with respect to the states' police powers, the Court did not hold the State to the stricter standard established in the Court's prior First Amendment obscenity cases. *Id.* 409 U.S. at 116 (citing *United States v. O'Brien*, 391 U.S. 367 (1968); *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, (1958); and *Roth v. United States*, 354 U.S. 476 (1957)).

In *Craig v. Boren*, 429 U.S. 190 (1976), the Court considered the tension between the Twenty-First Amendment and the Equal Protection Clause of the Fourteenth Amendment. There, the State discriminated between male and female consumers of beer on the basis of age. Even in the face of the State's exercise of its police power on an issue of temperance, the Court held that the Twenty-First Amendment did "not save the invidious gender-based discrimination from invalidation as a denial of equal protection of the laws in violation of the Fourteenth Amendment." *Id.*, 429 U.S. at 204-05. These cases clearly put to rest any notion that, particularly in economic matters, the Twenty-First Amendment gave the states *carte blanche* with respect to intoxicating liquors.

In 1980, the Court was faced with a direct conflict between a State's economic regulation of commerce in alcoholic beverages under the Twenty-First Amendment and the federal government's regulation of interstate commerce under the Commerce Clause. In *California*

Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) ("*Midcal*"), the Court held that California's retail price maintenance and price posting statutes for the wholesale wine trade violated the Sherman Act. The Court framed a further issue before it: "whether § 2 [of the Twenty-First Amendment] permits California to countermand the congressional policy – adopted under the commerce power – in favor of competition." *Id.*, 445 U.S. at 106. The Court again revisited the early Twenty-First Amendment cases commencing with *Young's Market*. The Court stated:

> The Twenty-first Amendment grants the States virtually complete control over *whether to permit importation or sale of liquor and how to structure the liquor distribution system*. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. *The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case."*

Id., 445 U.S. at 110 (citing *Idlewild, supra*, 377 U.S. at 332, emphasis supplied). Following this analysis, the Court concluded that the Twenty-First Amendment "provides no shelter for the violation of the Sherman Act caused by the State's wine pricing program." *Id.*, 445 U.S. at 114. Even if notions that the states were unfettered by the Commerce Clause with respect to regulation of alcoholic beverages had not disappeared by the time of *Idlewild* in 1964, they clearly had disappeared by *Midcal* in 1980.

A close analysis of this Court's decisions compels the conclusion that the pre-*Bacchus* statute at issue in the

instant case violated Commerce Clause doctrine well settled by 1982, 1983 and 1984. *Bacchus* did not change the law in this respect. The purpose and effect of the pre-*Bacchus* statute were to provide economic protection to Georgia producers of alcohol and the agricultural products from which it is made. The purpose and effect were to the detriment of out-of-state producers. As even the Georgia Supreme Court acknowledged, this purpose and effect precluded further scrutiny of the pre-*Bacchus* statute by the courts. *James B. Beam Distilling Co v. State, supra*, 259 Ga. at 364, 382 S.E.2d at 96. *See also Minnesota v. Clover Leaf Creamery Co., supra*, 449 U.S. 457, 471 (1981); *Lewis v. BT Investment Managers, Inc., supra*, 447 U.S. 27, 36-37 (1980); and *Philadelphia v. New Jersey, supra*, 437 U.S. 617, 624 (1978). Neither the Twenty-First Amendment nor this Court's case law construing the Twenty-First Amendment justified the State in believing as late as 1982 that it could tax importers of alcoholic beverages in a manner that directly contravened clearly-established principles under the Commerce Clause.

In fact, none of this Court's Twenty-First Amendment cases leading up to *Midcal* even dealt with a direct tax on liquor products. By the time *Midcal* was decided in 1980, the State clearly had to be able to show some purpose and effect for the pre-*Bacchus* statute other than economic protectionism, a State interest that clearly would not outweigh the federal interests protected by the Commerce Clause. Once the Georgia courts found that the only purpose behind and effect of the pre-*Bacchus* statute were to discriminate against out-of-state producers, Beam became entitled to a clear and certain remedy under the principles discussed in *McKesson, supra*.

Another recent case from this Court sheds substantial light on this analysis. In *Ashland Oil, Inc. v. Caryl*, 58 U.S.L.W. 3832 (U.S. June 28, 1990) (No. 88-421) (*"Ashland Oil"*), the Court considered the issue of retroactive application of one of its Commerce Clause decisions. In *Ashland Oil* a gross receipt tax was imposed by the State of West Virginia on persons selling tangible property at wholesale. Local manufacturers were exempt from the tax. The Court was required to determine whether to give retroactive application to *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) (*"Armco"*), which rendered invalid the West Virginia taxing scheme as an impermissible infringement upon interstate commerce. Reviewing the decision of the West Virginia Supreme Court to withhold retroactive application of *Armco*, the Court stated:

> Relying on its state-law criteria for retroactivity, *see Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E. 879 (1979), which it considered to 'follow closely the analysis employed by the United States Supreme Court in *Chevron Oil Co. v. Huson*, . . . the [West Virginia Supreme] Court determined that *Armco* 'represented a reversal of prior precedent, and that retroactive application of the *Armco* rule would cause severe hardship.' *Id.*, at ___, 350 S.E.2d at 536.

Ashland Oil, supra, 58 U.S.L.W. at 3832.

Reversing the decision of the West Virginia Supreme Court, this Court held that *Armco* did not overrule clear past precedent or decide an issue of first impression. Significantly, the Court in *Armco* relied upon *Boston Stock Exchange, supra*, 429 U.S. 318 (1977), in holding that a state may not discriminate between transactions solely because of some interstate element. *Id.* "On its face, West

Virginia's statutory scheme had just such a discriminatory effect, as it 'provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it.' *Armco, supra*, at 642." *Id.* The *Bacchus* Court relied as well on *Boston Stock Exchange* in support of its decision that the Hawaii statute had a similar discriminatory effect "depending on whether the taxpayer conducts manufacturing in the State or out of it." *Bacchus*, 468 U.S. at 272. Like *Armco, Bacchus* did not overrule any prior authority, nor did it decide an issue of first impression that was not clearly foreshadowed by prior case law. The instant case and *Ashland Oil* are directly analogous.

In *Bacchus* this Court cited case law reaching back into the 1800's to support its decision that Hawaii's tax enacted for the express purpose of promoting the Hawaiian liquor industry clearly violated the Commerce Clause. The Court cited *Walling v. Michigan*, 116 U.S. 446 (1886) (striking down a law imposing a tax on the sale of alcoholic beverages produced outside the state). *Bacchus, supra*, 468 U.S. at 271. The Court also cited *Welton v. Missouri*, 91 U.S. 275 (1876) (striking down a statute discriminating against goods " 'which are the growth, product or manufacture of other states or countries. . . . ' "). *Bacchus, supra*, 468 U.S. at 271.

Critically, once it is recognized that the purpose of the Georgia statute was (and remains) protectionist, a fact conceded by the lower courts in Georgia, the principles enunciated in *Bacchus* applicable to the Georgia statute become matters of long-settled precedent predating the turn of the century.

> This Court has adopted what amounts to a two-tiered approach to analyzing state economic regulations under the Commerce Clause. When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. *See, e.g., Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1925).

Brown-Forman Distillers v. N.Y. State, supra, 476 U.S. at 578-79 (1986).

Finally, *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939), *overruled on other grounds, Blackston v. Georgia Department of Natural Resources*, 225 Ga. 15, 334 S.E.2d 679 (1985) (*"Scott"*), should not provide Georgia with refuge within which to hide the fruits of its discredited protectionist taxing scheme. In *Scott* in 1939 the Georgia Supreme Court upheld the forerunner of the pre-*Bacchus* statute against a Commerce Clause challenge. The Georgia Supreme Court stated in *Scott* that "It is sufficient to state that the Commerce Clause does not apply to the regulation by states of the importation of intoxicating liquor." *Id.*, 187 Ga. at ___, 2 S.E. 2d at 66.[9] Assuming there was some basis in this Court's prior decisions at the time *Scott* was decided to support such an analysis, any such basis had clearly evaporated not later than 1964 with *Idlewild* and 1980 with *Midcal*. In relying upon *Scott* in the instant case to support its holding of nonretroactivity, the Supreme Court of Georgia did not even attempt to

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[9] No attempt was made to appeal the Georgia Supreme Court's decision in *Scott v. State* to this Court.

analyze the precedent of this Court. *See Generally* J.A., pp. 102-03. Because *Bacchus* did not overrule prior precedent or decide an issue of first impression that was not foreshadowed by prior case law, *Bacchus* clearly fails the first of *Chevron Oil's* three tests for nonretroactive application.

B. Retrospective Application of *Bacchus* will Clearly Further the Operation and Intent of the Commerce Clause

Where a judicial decision does not meet the first of the *Chevron Oil* criteria, there is no occasion even to consider the remaining criteria, and the decision is applied in the customary retroactive manner. *See Ashland Oil, supra*, 58 U.S.L.W. at 3832 ("Because *Armco* did not overrule clear past precedent or decide a wholly new issue of first impression, it does not meet the first prong of the *Chevron Oil* test. *Armco* thus applies retroactively. . . . ") Even so, the remaining *Chevron Oil* criteria clearly militate in favor of retroactivity in this case.

The second prong of the *Chevron Oil* test, as noted by the Court in *ATA*, requires the Court to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 58 U.S.L.W. at 4707, *citing Chevron Oil*, 404 U.S. at 106-107 (citations and internal quotations omitted). In *ATA* the Court concluded, however, "that the purpose of the Commerce Clause does not dictate retroactive application of *Scheiner*. . . . " *ATA, supra*, 58 U.S.L.W. at 4708. The distinction between *ATA* and the instant case

as respects furthering the purpose of the Commerce Clause is revealed in the following statement from *ATA*: "[T]he HUE tax was entirely consistent with the underlying *Aero Mayflower* line of cases and it is not the purpose of the Commerce Clause to prevent legitimate state taxation of interstate commerce. *See Complete Auto Transit*, 430 U.S. at 288." *ATA, supra*, 58 U.S.L.W. at 4708. Conversely, as the foregoing discussion in Section II.A reveals, the State of Georgia has no claim to a clear line of case authority supporting its taxing scheme. Moreover, Georgia's own courts have determined that the tax was not a "legitimate state taxation of interstate commerce," but rather a form of invidious discrimination, the likes of which the Commerce Clause was specifically enacted to prohibit.

The compelling need for a backward-looking remedy in the instant case springs from the pages of the documents produced by the State to Beam prior to the trial court's summary judgment order below, and excerpted in the Factual Background, *supra*, pp. 5-8. The Court has specifically recognized intransigence in the application of its decisional principles as a valid consideration under the second prong of *Chevron Oil. See Florida v. Long*, 108 S.Ct. 2354, 2362 (1988) ("[r]etroactive awards are not necessary to further Title VII's purposes and to ensure compliance with this Court's decisions since Florida acted immediately . . . to correct its discriminatory optional plans . . . ").

Had the State of Georgia reacted to *Bacchus* in a manner consistent with the Constitution, perhaps the need for a deterrant application of *Bacchus* would be less justified. In the instant case, however, the State

immediately sought ways to mask its actions such that it could avoid the effect of *Bacchus* without even attempting to square the actual intent behind or effect of the post-*Bacchus* statute with the constitutionally mandated federal interests promoted by the Commerce Clause. The primary concern of the State was not to "let [the] U.S. Supreme Court change [Georgia's] public policy" of protecting local growers from foreign competition.

Plainly the effect of the post-*Bacchus* statute remains identical to that of the pre-*Bacchus* statute with only a "makebelieve" legitimate purpose appended to the enacting legislation. This Court should not sanction such invidious behavior by a state legislature. In fact, absent retroactive relief, the states may forestall indefinitely any remedy by effecting cosmetic changes to statutes held to be unconstitutional, as the State of Georgia has done in this case.[10]

Moreover, retroactive application of *Bacchus* in this particular instance will further the implied purpose of the Commerce Clause by helping to redress the competitive

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[10] The post-*Bacchus* statute was challenged as unconstitutional in *Heublein, Inc. v. State, supra*, 256 Ga. 578, 351 S.E.2d 190 (1987), *appeal dismissed*, 107 S.Ct. 3253 (1987). However, at the time that *Heublein* was decided in January of 1987 counsel for Beam (who were also counsel for Heublein) did not have available to them the documentary evidence presented in this case to establish the illegitimacy of the amended statute. (As indicated, these documents were produced through discovery in this case, the Complaint for which was not filed until April of 1987.) Therefore, Heublein was not in a position to question the stated purpose of the amended statute, which went "unchallenged." *See Heublein*, 351 S.E. 2d at 196.

imbalance imposed by the State of Georgia against out-of-state liquor manufacturers. Pursuant to the remedial requirements imposed on the states in *McKesson*, Georgia would be required in some way to put in-state and out-of-state manufacturers back on an equal footing, either by refunding the taxes assessed against the Petitioner, assessing additional taxes against its in-state competitors, or some combination of the two. This of course cannot but help to restore the parties to their respective competitive positions had the protectionist legislation never been implemented.

Clearly, promoting competition in the free market among and between the various states is a purpose driving the Commerce Clause. Just as clearly, restoring the competitive balance distorted by the Georgia legislature in this case will advance that purpose.

C. No Inequity Would be Imposed by Retroactive Application of Bacchus

The third criterion for nonretroactivity established in *Chevron Oil* is that a decision should not be given retroactive application where such an application "could produce substantial inequitable results. . . . " *Chevron Oil, supra,* 404 U.S. at 107. As far as equitable considerations are concerned, the State of Georgia does not come into this Court with clean hands.

In *ATA,* in considering the equities involved, this Court gave careful consideration to the State's good faith belief in the propriety and constitutionality of its taxing scheme, based upon a scheme declared valid by this Court in cases such as *Aero Mayflower Transit Company v.*

Board of Railroad Comm'rs, 332 U.S. 495 (1947). In the instant case, however, the Georgia Legislature not only had every reason, by as early as 1964, to believe its taxing scheme unconstitutional, but sought to retain that scheme even after it was definitively declared so by this Court. Moreover, there is not even a hint that in enacting the statute in question Georgia sought to regulate or control alcoholic evils; rather the evidence demonstrates conclusively that Georgia sought to promote trade in alcoholic beverages, albeit with an eye towards promoting in particular Georgia's in-state manufacturers.

In *ATA* this Court made the following observation with respect to the equities involved in retroactive application of *Scheiner*:

> In sum, we conclude that applying *Scheiner* retroactively would 'produce substantial inequitable results.' *Chevron Oil,* 404 U.S., at 107. The invalidation of the HUE tax has the potential for severely burdening the State's operations. *That burden may be largely irrelevant when a State violates constitutional norms well established under existing precedent.* See *McKesson.* But we think it unjust to impose this burden when the State relied on valid existing precedent in enacting and implementing its tax.

ATA, 58 U.S.L.W. at 4709 (emphasis supplied). By contrast, in the instant case the burden on the State of Georgia should be "largely irrelevant" because the State continued to "violate[] constitutional norms well established" long after the State had any right to assume that its protectionist scheme was constitutional.

Moreover, the financial burden on Georgia is clearly circumscribed by its three year statute of limitations.

Because more than three years have expired since this statute was amended, all claims that can be brought under the pre-*Bacchus* statute have in fact been brought, and the amount of refund money at stake is a known quantity. Thus, any force behind the argument that a retroactive application of *Bacchus* would disrupt the State's budgeting and financial planning is dissipated. Also, under *McKesson*, the Georgia Department of Revenue could simply issue "credit memos" to those with valid refund claims. These memos would allow those companies victimized by the pre-*Bacchus* statute to recoup their losses over time, using the memos to claim tax exemptions up to the amounts unconstitutionally collected. In short, *McKesson* grants the states broad latitude in fashioning remedies tailored to avoid any disruption of the states' budgeting and financing processes. Having put into effect a statute that expressly contemplates that taxes may have to be refunded (see Holmes, J., *supra*, at p. 17) the State now claims that it would be incovenient to refund so large a sum. In substance, the State claims allowance to redress its smaller overcollections while ignoring the larger ones – a ridiculous notion. To allow the states to escape retribution under a pretext that amounts to a claim that it would be "inconvenient" to redress the inequity could hardly promote the deterrence of similar such conduct in the future.

III. AT A MINIMUM, THE STATE MUST GRANT BEAM RETROSPECTIVE RELIEF WITH RESPECT TO TAXES PAID AFTER JUNE 29, 1984, THE DATE *BACCHUS* WAS DECIDED

This Court decided *Bacchus* on June 29, 1984. The State has absolutely no argument available to it to deny

Beam retrospective relief for taxes paid on sales of alcohol after that date. For all of the reasons stated above, Beam should be granted retrospective relief with respect to all of the taxes it paid pursuant to the pre-*Bacchus* statute in 1982, 1983 and 1984. At a minimum, even should this Court decline to apply *Bacchus* retroactively, the Court should remand the case to the Georgia courts for a determination of the amount of taxes paid by Beam pursuant to the constitutionally infirm statute after June 29, 1984. Once that determination has been made, Beam is entitled at a minimum to retrospective relief with respect to that portion of the taxes paid.

CONCLUSION

The judgment of the Supreme Court of the State of Georgia should be reversed with respect to the issue of whether the Petitioner is constitutionally entitled to a remedy for the State's imposition of the unconstitutional pre-*Bacchus* statute.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISION INVOLVED

The following state excise taxes are levied and imposed:

> (1) On the importation of all distilled spirits imported into this state, a tax of $1.00 per liter and on all alcohol imported into this state, a tax of $1.40 per liter, and a proportionate tax at the same rate on all fractional parts of a liter;
>
> (2) On the manufacture of all distilled spirits manufactured in this sate from Georgia-grown products, a tax of $ .50 per liter and on all alcohol manufactured in this state from Georgia-grown products, a tax of $ .70 per liter, and a proportionate tax at the same rate on all fractional parts of a liter.

O.C.G.A. § 3-4-60 (1982).

AMENDED § 3-4-60

The following state taxes are levied and imposed.

(1) There shall be imposed upon the first sale, use, or final delivery within this state of all distilled spirits an excise tax in the amount of $ .50 per liter and, upon the first sale, use, or final delivery within this state of alcohol, an excise tax in the amount of $ .70 per liter, and a proportionate tax at the same rate on all fractional parts of a liter;

(2) There shall be imposed upon the importation for use, consumption, or final delivery into this state of all distilled spirits an import tax in the amount of $ .50 per liter and, upon the importation for use, consumption, or final delivery into this state of all alcohol, an import tax in the amount of $ .70 per liter, and a proportionate tax at the same rate on all fractional parts of a liter; and

(3) All alcohol spirits manufactured within this state for sale within this state shall be made from Georgia grown products.

O.C.G.A. § 3-4-60 (1985).

United States Constitution, Article 1, Section 8, clause 3:

The Congress shall have Power To * * * regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

REFUND PROVISION

(a) A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner. Refunds shall be drawn from the treasury on warrants of the Governor issued upon itemized requisitions showing in each instance the person to whom the refund is to be made, the amount of the refund, and the reason for the refund.

(b)(1) A claim for refund of a tax or fee erroneously or illegally assessed and collected may be made by the taxpayer at any time within three years after the date of the payment of the tax or fee to the commissioner. Each claim shall be filed in writing in the form and containing such information as the commissioner may reasonably require and shall include a summary statement of the grounds upon which the taxpayer relies. Should any person be prevented from filing such an application because of his own or his counsel's service in the armed forces during such period, the period of limitation shall date from his or her counsel's discharge from the service.

(2) In the event the taxpayer desires a conference or hearing before the commissioner in connection with any claim for refund, he shall specify such desire in writing in the claim and, if the claim conforms with the requirements of this Code section, the commissioner shall grant a conference at a time he shall reasonably specify.

(3) The commissioner or his delegate shall consider information contained in the taxpayer's claim for refund, together with such other information as may be available, and shall approve or disapprove the taxpayer's claim and notify the taxpayer of this action.

(4) Any taxpayer whose claim for refund is denied by the commissioner or his delegate or whose claim is not decided by the commissioner or his delegate within one year from the date of filing the claim shall have the right to bring an action for a refund in the superior court of the county of the residence of the taxpayer, except that:

(A) If the taxpayer is a public utility or a nonresident, the taxpayer shall have the right to bring an action for a refund in the superior court of the county in which is located the taxpayer's principal place of doing business in this state or in which the taxpayer's chief or highest corporate officer or employee resident in this state maintains his office; or

(B) If the taxpayer is a nonresident individual or foreign corporation having no place of doing business and no officer or employee resident maintaining his office in this state, the taxpayer shall have the right to bring an action for a refund in the Superior Court of Fulton County or in the superior court of the county in which the commissioner in office at the time the action is filed resides.

(5) No action or proceeding for the recovery of a refund under this Code section shall be commenced before the expiration of one year from the date of filing the claim for refund unless the commissioner or his delegate renders a decision on the claim within that time, nor shall any action or proceeding be commenced after the expiration of two years from the date the claim

is denied. The two-year period prescribed in this paragraph for filing an action for refund shall be extended for such period as may be agreed upon in writing between the taxpayer and the commissioner during the two-year period or any extension thereof.

(c) In the event any taxpayer's claim for refund is approved by the commissioner or his delegate and the taxpayer has not paid other state taxes which have become due, the commissioner or department may set off the unpaid taxes against the refund. When the setoff authorized by this subsection is exercised, the refund shall be deemed granted and the amount of the setoff shall be considered for all purposes as a payment toward the particular tax debt which is being set off. Any excess refund remaining after the setoff has been applied shall be refunded to the taxpayer.

O.C.G.A. § 48-2-35 (1982).

In The

Supreme Court of the United States

October Term, 1969

JAMES B. BEAM DISTILLING CO.,

Petitioner,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Respondents.

On Petition For Certiorari
To The Supreme Court of Georgia

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the Georgia Supreme Court properly found, under the *Chevron Oil* test, that its decision invalidating a longstanding alcoholic beverage tax under the principles of law established in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), should apply prospectively only.

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No. 89-680

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To The Supreme Court of Georgia

BRIEF FOR RESPONDENTS

CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of Georgia is officially reported at 259 Ga. 363 (1989), and is unofficially reported at 382 S.E.2d 95 (1989). In addition, the text of the opinion is included in the Joint Appendix ("J.A."). J.A. 100.

STATEMENT OF JURISDICTION

Respondents concur in the Petitioner's statement of the grounds on which the jurisdiction of this Court is invoked.

STATUTORY PROVISION AT ISSUE

The statute at issue in this case is O.C.G.A. § 3-4-60 as it existed prior to its amendment in 1985. The text of O.C.G.A. § 3-4-60 as it then existed is included in the Joint Appendix. J.A. 18.

STATEMENT OF THE CASE

On August 24, 1987, Petitioner, James B. Beam Distilling Company (hereinafter "Beam"), brought this action challenging the constitutionality of O.C.G.A. § 3-4-60, as codified in 1982, 1983 and 1984 (hereinafter "the claim period"), and, pursuant to O.C.G.A. § 48-2-35(a), claimed a refund of $2,400,000 for taxes paid under the now repealed statute. As codified during the claim period, O.C.G.A. § 3-4-60 imposed taxes on all alcoholic beverages manufactured in or imported into Georgia. Under the provisions of the statute, alcoholic beverages imported into the state by either in-state or out-of-state producers or manufacturers were subject to a higher tax than alcoholic beverages manufactured in Georgia. 1981 Ga. Laws 1269, § 35; O.C.G.A. § 3-4-60 (Michie 1982).

A tax structure similar to that embodied by O.C.G.A. § 3-4-60 had been in effect in Georgia since 1938. The

original legislation imposing taxes on alcoholic beverages manufactured and imported into Georgia was enacted in 1938 as Section 11 of the "Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors" (hereinafter the "1938 Act"). 1937-38 Ga. Laws (Ex. Sess.) 103.

Enacted not long after the end of Prohibition and the adoption of the Twenty-first Amendment, the 1938 Act was intended to provide for the "taxation, legalization, control, manufacture, importation, distribution, sale and storage of alcoholic beverages." 1937-38 Ga. Laws (Ex. Sess.) 103. Under Section 11 of the Act, imported alcoholic beverages were subject to a higher tax than alcoholic beverages manufactured in Georgia.

Shortly after its enactment, Section 11 of the 1938 Act was challenged on the grounds that it violated the Commerce Clause of the United States Constitution. In *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939), *overruled on other grounds, Blackston v. Georgia Department of Natural Resources*, 255 Ga. 15, 334 S.E.2d 679 (1985), the Georgia Supreme Court upheld the constitutionality of Section 11 finding that "the right of a State to prohibit or regulate the importation of intoxicating liquors is not limited by the Commerce Clause." 187 Ga. at 705, 2 S.E.2d at 66 (citations and internal quotations omitted). In support of its holding, the Georgia Supreme Court cited the opinions of this Court in *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939), *Indianapolis Brewing Co. v. Liquor Control Commissioner*, 305 U.S. 391 (1939), *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1939), and *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936).

Since 1938, the tax system created by Section 11 of the 1938 Act has been amended several times to revise rates and effect other minor changes. The most recent amendment was in 1985, which amendment repealed the statute at issue in this case. The Georgia legislature enacted the 1985 Amendment in response to this Court's ruling in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (hereinafter "*Bacchus*") and at the legislature's first opportunity to address the issues raised in *Bacchus*. In enacting the 1985 Amendment, which also imposed a direct tax on the importation of alcoholic beverages into Georgia, the Georgia legislature found that a tax on importation was necessary to offset the increased cost of regulating imported alcoholic beverages. 1985 Ga. Laws 665 (the cost of regulating imported alcoholic beverages is greater than that for locally manufactured alcoholic beverages); O.C.G.A. § 3-4-60 (Michie 1989 Supp.).

In April of 1985, in the first challenge to Georgia's tax on imported alcoholic beverages since the *Scott* case in 1939, the 1985 Amendment was challenged on Equal Protection and Commerce Clause grounds. The Georgia Supreme Court, as it had in *Scott*, upheld the constitutionality of the tax structure, finding that the unchallenged purpose of the import tax, as set forth in the law, implicated central concerns of the Twenty-first Amendment and did not violate the Commerce Clause. *Heublein, Inc. v. Georgia*, 256 Ga. 578, 351 S.E.2d 190, *appeal dismissed*, 483 U.S. 1013 (1987). This Court effectively affirmed the decision in *Heublein* by declining further review of the Georgia Supreme Court's decision; the 1985 Amendment is not at issue in this case.

Also in April of 1985, Beam filed a claim with the Georgia Revenue Department for a refund of taxes

allegedly paid pursuant to O.C.G.A. § 3-4-60, as the statute existed during the claim period (hereinafter the "pre-*Bacchus* statute"), challenging the constitutionality of the statute which was by then repealed. J.A. 10-13. This claim represented the first occasion on which Beam had ever challenged Georgia's alcoholic beverage tax, having never paid its tax to Georgia under protest or sought any protection from paying the tax.

On April 24, 1987, Beam filed this tax refund action in Fulton County Superior Court pursuant to O.C.G.A § 48-2-35(a). In its Complaint, Beam challenged the pre-*Bacchus* statute on the grounds that its tax provisions relating to alcoholic beverages manufactured outside of Georgia violated the Commerce Clause and the Equal Protection Clause of the United States Constitution. J.A. 2.

This matter came before the trial court on cross motions for summary judgment. After hearing these motions, the Superior Court of Fulton County, on May 27, 1988, entered an order holding the pre-*Bacchus* statute unconstitutional under the Commerce Clause. However, the trial court, after applying the nonretroactivity test set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), directed that its decision on the statute's constitutionality apply prospectively only, and that Beam, therefore, recover nothing on its claim for refund of the taxes paid in the past. J.A. 29-31.

Beam appealed the trial court's "prospectivity" holding to the Supreme Court of Georgia, urging that Georgia's refund statute required a refund as a matter of state law. The Georgia Supreme Court, in a decision dated July

14, 1989, ruled that the Georgia refund statute did not mandate a refund, and that the trial court correctly interpreted Georgia law in applying its decision prospectively. J.A. 100. The court denied Beam's Motion for Rehearing on July 26, 1989.

Beam thereafter filed its Petition for Writ of Certiorari. This Court granted the Petition within one week of its rulings in *American Trucking Associations, Inc. v. Smith*, 58 U.S.L.W. 4704 (U.S. June 4, 1990) (No. 88-325) (hereinafter *"ATA"*) and *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 58 U.S.L.W. 4665 (U.S. June 4, 1990) (No. 88-192) (hereinafter *"McKesson"*).

SUMMARY OF ARGUMENT

This appeal raises issues essentially identical to those disposed of in the *ATA* case. As in *ATA*, the question before this Court is whether the Georgia Supreme Court properly gave prospective effect only to its decision invalidating Georgia's pre-*Bacchus* import tax on alcoholic beverages.

Relying on longstanding precedent of this Court, the Georgia Supreme Court applied the *Chevron Oil* test to its decision to determine whether the decision should apply prospectively only. The Georgia Supreme Court concluded that its decision, based upon the principles of law established in *Bacchus*, satisfied each of the three parts of the *Chevron Oil* test. Although the Georgia Supreme Court analyzed its own decision, rather than the *Bacchus* decision, under the *Chevron Oil* test, the *Bacchus* decision also satisfies each of the three parts of the *Chevron Oil* test.

In applying the first part of the *Chevron Oil* test, it is clear that the decision in *Bacchus* established a new principle of law by overruling past precedent on which Georgia had reasonably relied. In *Bacchus*, the Court recognized for the first time the existence of "central purposes" underlying the Twenty-first Amendment, which purposes did not include permitting "states to favor local liquor industries by erecting barriers to competition." *Bacchus*, 468 U.S. at 276. In a totally novel approach to the Twenty-first Amendment, the Court reasoned that state laws that regulate alcoholic beverages and also protect the local economy do not sufficiently implicate the "central purposes" of the Twenty-first Amendment so as to prevail over the Commerce Clause. Yet, prior to *Bacchus*, the Court had consistently recognized the right of a state to prohibit or regulate the importation of intoxicating liquor without limitation by the Commerce Clause. *See, e.g., Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936).

Although prior to *Bacchus* the Court had recognized some limitations on a state's power to regulate under the Twenty-first Amendment, the Court had not recognized any limitations on a state's power to regulate the importation of alcoholic beverages. Prior to *Bacchus*, the only types of cases in which the Court recognized limitations involved (1) state regulation of alcoholic beverages in direct conflict with federal regulation of interstate commerce, (2) state regulation of alcoholic beverages in direct conflict with certain provisions of the Constitution other than the Commerce Clause, and (3) state regulation of alcoholic beverages not destined for delivery or use in the state. *See* discussion *infra* pp. 16-20. At no time prior to

Bacchus, however, had the Court found that the Commerce Clause alone limited a state's power to regulate the importation of alcoholic beverages into its borders.

Bacchus, therefore, clearly established a new principle of law. Additionally, the Georgia Supreme Court opinion, based upon *Bacchus*, established a new principle of law by effectively overturning the prior opinion of the court in the case of *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939). In *Scott v. State*, the Georgia Supreme Court upheld the constitutionality of the predecessor to the statute at issue, finding that the right of the state to prohibit or regulate the importation of alcoholic beverages was not limited by the Commerce Clause. The holding in *Scott* remained unchallenged until the filing of Beam's refund claim in 1985. In light of the precedents of this Court and the Georgia Supreme Court, therefore, Georgia had no reason to expect that its pre-*Bacchus* statute would be invalidated.

Bacchus also meets the second part of the *Chevron Oil Test* which requires a determination of whether retroactive application of the rule in question will further the rule's purpose. As in *ATA*, the Commerce Clause does not dictate retroactive application of the new principle of law established in this case. As the Court in *ATA* noted, "it was not the purpose of the Commerce Clause to prevent legitimate state taxation of interstate commerce." *ATA*, 58 U.S.L.W. at 4708. Because the pre-*Bacchus* statute was "legitimate state taxation of interstate commerce" prior to the decision in *Bacchus*, the Commerce Clause would not be furthered by retroactive application of *Bacchus*. Furthermore, retroactive application is not necessary to deter future violations by Georgia as the statute at issue has been repealed and replaced with a constitutionally valid

amendment. *Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190, *appeal dismissed*, 483 U.S. 1013 (1987).

Finally, a balancing of the equities in this case, as called for by the third part of the *Chevron Oil* test, clearly favors prospective application of *Bacchus* and the Georgia Supreme Court decision based upon it. The State of Georgia collected the taxes at issue in good faith reliance on longstanding precedents of this Court and its own supreme court. Indeed, not even Beam can seriously argue that Georgia acted in bad faith in collecting the taxes at issue when Beam did not challenge the pre-*Bacchus* statute until after the statute had been repealed in response to *Bacchus*. In light of Georgia's good faith reliance on a presumptively valid statute, it would be unjust and unfair to require it to refund some $30,000,000 in taxes. Retroactive application of the decision in *Bacchus* would create substantial economic hardship for Georgia at a time when the state is struggling to find the revenues to pay for billions of dollars in infrastructure needs.

Because the decision in *Bacchus* and the Georgia Supreme Court decision in this case satisfy the *Chevron Oil* test, prospective application of the Georgia Supreme Court decision is appropriate. Contrary to Beam's arguments, the reasoning and analysis in *McKesson* are inapplicable here. Unlike the Florida Supreme Court decision involved in *McKesson*, the Georgia Supreme Court decision at issue here was not based upon established principles of Commerce Clause jurisprudence, but upon a new principle of law. Because this case does not involve the application of settled principles of law, as in *McKesson*, the analysis used in that case is not controlling here.

ARGUMENT

I. THE GEORGIA SUPREME COURT PROPERLY GAVE PROSPECTIVE APPLICATION ONLY TO ITS DECISION INVALIDATING THE PRE-*BACCHUS* STATUTE.

Relying on longstanding precedent of this Court, the Georgia Supreme Court applied the nonretroactivity test in *Chevron Oil* to its decision invalidating the pre-*Bacchus* statute to determine whether its ruling should be given prospective application. Upon applying the *Chevron Oil* test, the Georgia Supreme Court concluded that its decision, based upon the principles of law established in *Bacchus*, should be given prospective effect only.

Since the Georgia Supreme Court entered its decision in this case, this Court, in the *ATA* case, has reaffirmed that the United States Constitution permits the prospective application of constitutional decisions of the Court and that the "retroactivtiy of decisions in the civil context continues to be governed by the standard announced in [*Chevron Oil*]." *ATA*, 58 U.S.L.W. at 4707 (citations and internal quotations omitted);[1] *see also Ashland Oil, Inc. v. Caryl*, 58 U.S.L.W. 3832 (U.S. June 28, 1990) (No. 88-421); *National Mines Corp. v. Caryl*, 58 U.S.L.W. 3831 (U.S. June 28, 1990) (No. 89-337). The three part *Chevron Oil* test, as used in *ATA*, provides as follows:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, . . . we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we [must] weig[h] the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

Chevron Oil v. Huson, 404 U.S. at 106-107 (citations and internal quotations omitted).

In the *ATA* case, the issue before the Court was whether the Arkansas Supreme Court had properly applied *Chevron Oil* to the Court's decision in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), holding certain taxes to be unconstitutional. Using the first part of the *Chevron Oil* test, the Court found that the Arkansas Supreme Court correctly concluded that *Scheiner* established a new principle of law by overturning the holdings in earlier cases. Under the second part of the test, the Court found that the Commerce Clause did not dictate retroactive application of the *Scheiner* decision because the Commerce Clause was not intended to prevent legitimate state taxation, which the Arkansas tax statute had been prior to the *Scheiner* decision. Finally, in balancing the equities of the retroactive application of *Scheiner*, the Court found that where the state had relied upon decisions of its highest court and of this Court in collecting and spending the taxes at issue, a retroactive

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[1] Although the Court in *ATA* was divided on the issue of whether a constitutional decision in a civil case could ever be given prospective effect only, Beam has not raised as an issue in this case the differences between the dissent and the plurality in *ATA*.

application requiring a refund would "produce substantial inequitable results." 58 U.S.L.W. at 4709.

The instant appeal presents issues essentially identical to those disposed of in the *ATA* case. Before the Court in this case, as in *ATA*, is the issue of whether the Georgia Supreme Court's decision invalidating the pre-*Bacchus* statute applies prospectively only in light of the *Chevron Oil* test. Like the *Scheiner* decision in *ATA*, the *Bacchus* decision, upon which the Georgia Supreme Court relied, established a new principle of law which Georgia could not have reasonably foreseen. Although the Georgia Supreme Court analyzed its own decision, rather than the *Bacchus* decision, under the *Chevron Oil* test, the following discussion clearly shows that the *Bacchus* decision, like the Georgia Supreme Court's decision, satisfies each of the three parts of the *Chevron Oil* test.

A. *Bacchus* Established A "New Principle Of Law" By Overruling Clear Past Precedent Upon Which Georgia Relied.

As with the *Scheiner* decision in *ATA*, the *Bacchus* decision easily meets the first test for nonretroactive application. Indeed, the three member dissent in *Bacchus* pointed out that the majority's analysis of the Twenty-first Amendment in *Bacchus* constituted a "totally novel approach to the Twenty-first Amendment", unsupported by the express language of the Twenty-first Amendment[2] and earlier Court decisions. *Bacchus*, 468 U.S. at 286-287.

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[2] Section 2 of the Twenty-first Amendment provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The issue before the Court in *Bacchus* was a Commerce Clause challenge to a Hawaii statute that exempted two local products entirely from an excise tax imposed on all other alcoholic beverages. As noted by the Court, the express purpose of the Hawaii statute – unlike the Georgia statute at issue here – was to promote local industry. The Court first analyzed the Hawaii statute under a strict Commerce Clause analysis because Hawaii attempted to defend its statute on Commerce Clause grounds alone. After finding Hawaii's statute unconstitutional under a traditional Commerce Clause analysis, the Court addressed Hawaii's belated Twenty-first Amendment argument.[3] Based upon the express language of the Hawaii statute to promote local industry, the Court concluded that the *sole* purpose of the statute was simple economic protectionism and was not supported by "any clear concern of the Twenty-first Amendment." *Bacchus*, 468 U.S. at 276. The Court, therefore, rejected Hawaii's Twenty-first Amendment defense, holding the Hawaii statute to be unconstitutional because of the burden it placed on alcoholic beverages imported into Hawaii.

The holding in *Bacchus* clearly went beyond existing Twenty-first Amendment case law. For the first time, the Court recognized the existence of "central purposes" underlying the Twenty-first Amendment, which purposes did not include permitting "states to favor local liquor industries by erecting barriers to competition." 468 U.S. at 276.[4] In light of these "central purposes," the Court

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[3] Hawaii raised the Twenty-first Amendment for the first time in the United States Supreme Court.

[4] The "central purposes" identified by the Court are not found in the language of the Amendment or its legislative history.

reasoned that state laws that regulate alcoholic beverages and also protect the local economy are not entitled to the same deference as "laws enacted to combat the perceived evils of unrestricted traffic in liquor." *Id.* Yet, prior to *Bacchus*, the Court had upheld state laws that regulated the importation of alcoholic beverages, even where the regulation also protected the local economy. *See, e.g., Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936).

Beginning with the Court's opinion in *Young's Market*, up until the decision in *Bacchus*, the Court had consistently recognized that the Twenty-first Amendment reserved to the states "the power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984). In *Young's Market*, one of the first cases to interpret the Twenty-first Amendment, the Court considered a Commerce Clause challenge to a California license tax on the privilege of importing beer into the state. In rejecting the constitutional attack, the Court recognized that the right to import without restriction has been "abrogated . . . so far as concerns intoxicating liquors" by the Twenty-first Amendment. *Young's Market*, 299 U.S. at 62. Noting that the Twenty-first Amendment empowered a state to forbid all importations into its territory, the Court went on to observe that "[s]urely the State may adopt a lesser degree of regulation than total prohibition" such as subjecting the foreign article to a heavy importation fee. 299 U.S. at 63. The Court held, therefore, that

> in the light of history, we cannot say that the exaction of a high license fee for importation may not, like the imposition of the high license fees exacted for the privilege of selling at retail, serve as an aid in policing the liquor traffic.

Id.

In cases following *Young's Market*, the Court continued to recognize the right of a state to prohibit or regulate the importation of intoxicating liquor without limitation by the Commerce Clause. *See Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939) (upheld a "retaliation" statute by which Missouri made it illegal to import liquor from any state that restricted the importation of Missouri liquor); *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U.S. 391 (1939) (upholding a "retaliation" statute which barred liquor imports from those states that prescribed shipments of liquor from other states); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938) (upholding state law which prohibited importation of liquor of more than twenty-five percent alcohol content not registered with the United States Patent Office but which did not apply to domestically manufactured liquors). The Court, however, also recognized in cases subsequent to *Young's Market* that the Twenty-first Amendment did not operate to divest Congress of all regulatory power over interstate and foreign commerce in intoxicating liquors and that the exercise of federal powers in some concrete circumstances limited a state's broad power to regulate intoxicating liquors. *See California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). But, as a review of the case law from *Young's Market* until *Bacchus* reveals, at no time before the 1984 decision in *Bacchus* did the Court find that

the Commerce Clause alone limits a state's right to regulate the importation of alcoholic beverages into its borders.

Indeed, the cases in which the Court recognized certain limitations on a state's exercise of its Twenty-first Amendment powers are so different from the case at hand that they cannot fairly or reasonably be said to have put the State of Georgia on notice that its pre-*Bacchus* statute was problematic. The cases in which the Court recognized limitations basically fall within three groups: (1) those cases in which the state attempted to regulate alcoholic beverages traveling *through* the state but not *into* the state for use therein; (2) those cases in which the state's regulatory authority conflicted with federal regulatory laws enacted under the Commerce Clause; and (3) those cases in which the state's regulatory authority conflicted with a provision of the Constitution other than the dormant Commerce Clause.[5]

In limiting the jurisdictional scope of a state's power under the Twenty-first Amendment, the Court in *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938), held that the Twenty-first Amendment did not give California the power to prevent shipments to and through her territory of liquors destined for a national park. According to the

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[5] In its brief, Beam also cites to traditional Commerce Clause cases in support of its argument that *Bacchus* did not establish a new principle of law. *E.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1984); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). None of these traditional Commerce Clause cases, however, involve the Twenty-first Amendment and thus do not constitute precedent in the area of Twenty-first Amendment case law.

Court, this traffic did not involve "transportation into California 'for delivery or use therein' " within the meaning of the Twenty-first Amendment. 304 U.S. at 538. Similarly, almost thirty years later, the Court, in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), found that the Twenty-first Amendment did not permit New York to regulate liquor shipped through the state of New York for ultimate use in a foreign country, rather than for use in New York. The Court in *Collins* and in *Hostetter*, therefore, established that a "shipment through a state is not transportation or importation into the state within the meaning of the Amendment." *Carter v. Virginia*, 321 U.S. 131, 137 (1944). Although noting this limitation on a state's jurisdictional power under the Twenty-first Amendment, the Court in *Hostetter* also noted that its earlier decisions holding that a state may restrict the importation of intoxicants unfettered by traditional Commerce Clause limitations remained unquestioned. *Hostetter*, 377 U.S. at 330.

The Court has also recognized limits on a state's regulatory power under the Twenty-first Amendment where the regulation conflicts with express federal regulation. For example, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court considered a challenge to a California wine pricing law on the grounds that it violated the Sherman Antitrust Act. Although the Court noted that the *"Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system,"* the Court also stated that where a state establishes other types of liquor

regulations, such as price maintenance, that "these controls may be subject to the federal commerce power in appropriate situations." *Id.* at 110 (emphasis added). In the case before it, the Court concluded that the federal interest embodied in the Sherman Antitrust Act to promote free enterprise outweighed the state's unsubstantiated interest in protecting small retailers. *Id.* at 114. The Court in *Midcal*, therefore, recognized that a state's Twenty-first Amendment powers may be limited where the state establishes a regulation that does not directly relate to the importation, sale or distribution of liquor and that squarely conflicts with the exercise of federal regulatory power over interstate commerce.

In a third area of cases, the Court has recognized that certain provisions of the Constitution, other than the Commerce Clause, can limit a state's power to regulate under the Twenty-first Amendment. For example, in *Craig v. Boren*, 429 U.S. 190 (1976), the Court addressed the relationship between the Equal Protection Clause and the Twenty-first Amendment in the context of gender classifications. In *Craig v. Boren*, the Court examined a state law that provided a higher minimum drinking age for men than for women with respect to purchases of beer. The Court declined to follow *Young's Market* to find that a classification recognized by the Twenty-first Amendment could not be forbidden by the Fourteenth Amendment, but also importantly recognized a critical difference between the economic discrimination in *Young's Market* and the gender classifications in the case before it. Indeed, the Court distinguished the *Young's Market* case as involving "a regulatory area [the importation of intoxicants] where the State's authority under the

Twenty-first Amendment is transparently clear" as well as "purely economic matters that traditionally merit only the mildest review under the Fourteenth Amendment." 429 U.S. at 207.

In another non-Commerce Clause case, *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964), the Court was faced with a challenge to state taxes assessed on liquor imported from outside of the United States. In holding that the Kentucky tax at issue violated the Export-Import Clause of the Constitution, the Court did not repudiate the holding in *Young's Market* with respect to a state's power to control the importation of alcoholic beverages from other states, but rather limited the state's power to regulate alcoholic beverages imported from foreign countries. Indeed, the Court reaffirmed the broad powers of the states under the Twenty-First Amendment in stating that:

> We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit the importation of some intoxicants, or of all intoxicants, destined for distribution, use, or consumption within its borders. There can surely be no doubt, either, of Kentucky's plenary power to regulate and control, by taxation or otherwise, the distribution, use, or consumption of intoxicants within her territory after they have been imported. All we decide today is that, because of the explicit and precise words of the Export-Import Clause of the Constitution, Kentucky may not lay impost on these imports from abroad.

377 U.S. at 346. The Court further distinguished the case before it from *Young's Market* by observing that the matter before it did not involve "the generalized authority given to Congress by the Commerce Clause, but a constitutional

provision which flatly prohibits any state from imposing a tax upon imports from abroad." 377 U.S. at 344.

As the above review of cases demonstrates, the principles underlying the Court's holding in *Young's Market* stood firm until the *Bacchus* opinion in 1984. At no point during this fifty year period did the Court indicate that a state's power to regulate the importation of alcoholic beverages into its borders for use therein was limited by the dormant Commerce Clause. At no time during this period did the Court indicate that it would invalidate a state tax on imported alcoholic beverages where that regulation did not also conflict with federal regulation of interstate or foreign commerce or attempt to regulate liquor transported through the state. Furthermore, at no point until *Bacchus* did the Court indicate that a statute must implicate "central concerns" of the Twenty-first Amendment in order to prevail over the Commerce Clause. From *Young's Market* to *Bacchus*, therefore, the case law of the Court clearly supported the right of a state under the Twenty-first Amendment to regulate the importation of alcoholic beverages into the state by means of an import tax.

The sharp departure from previous case law made by *Bacchus* is indisputable. Justice Stevens, joined by Justices Rehnquist and O'Connor, noted the departure from long-standing precedents of the Court and commented upon it at length in his dissenting opinion in *Bacchus*. Commentators analyzing *Bacchus* have also noted that the Court in *Bacchus* "went beyond Section Two precedents and found a new interpretation of the meaning of Section Two itself." Comment, *The Twenty-first Amendment and the Commerce Clause: What Rationale Supports Bacchus*

Imports?, 13 Hastings Const. L.Q. 361, 382 (1986). Even Beam must be said to have recognized the departure made by the Court in *Bacchus* as it did not challenge the Georgia statute at issue until after the decision in *Bacchus*. J.A. 10-13.

Bacchus, therefore, clearly established a new principle of law in Commerce Clause/Twenty-first Amendment jurisprudence. Additionally, the Georgia Supreme Court opinion, based upon *Bacchus*, established a new principle of law by effectively overturning the prior opinion of the court in the case of *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939). As noted earlier, the Georgia Supreme Court in *Scott v. State* upheld the constitutionality of a predecessor to the statute at issue, finding that the right of a state to prohibit or regulate the importation of alcoholic beverages was not limited by the Commerce Clause. The holding in *Scott* remained unchallenged until the filing of Beam's refund claim in 1985.

In light of the Georgia Supreme Court decision in *Scott* as well as the decisions of the Court, there was no reason for Georgia to expect that its pre-*Bacchus* statute would be invalidated – even if the statute had the effect of protecting the local economy. Up until *Bacchus*, such a purpose or effect was permissible so long as the state's regulation fell within the express powers of the Twenty-first Amendment to regulate the importation of alcoholic beverages.

B. Retroactive Application Of *Bacchus* Will Not Further The Purpose Of The Commerce Clause.

Bacchus also easily meets the second part of the *Chevron Oil* test which requires a determination of whether

retroactive application of the rule in question will further the rule's purpose. As in *ATA*, the Commerce Clause does not dictate retroactive application of the new principle of law established in this case. Although the central purpose of the Commerce Clause is to create an area of free trade between the states, "it is not the purpose of the Commerce Clause to prevent legitimate state taxation of interstate commerce." *ATA*, 58 U.S.L.W. at 4708. Because the pre-*Bacchus* statute was a "legitimate state taxation of interstate commerce" prior to the decision in *Bacchus*, the Commerce Clause would not be furthered by a retroactive application of *Bacchus* and the Georgia Supreme Court decision based upon it.

Furthermore, contrary to Beam's arguments, retroactive application is not necessary to deter future violations by the State of Georgia. Indeed, as the Georgia Supreme Court noted in its decision in this case, such a concern has been rendered moot by the fact that the Georgia legislature acted promptly after the decision in *Bacchus* to repeal the statute at issue and to enact an amendment which the Georgia Supreme Court has upheld under the principles established in *Bacchus*. J.A. 103; *see Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190 (1987), *appeal dismissed*, 483 U.S. 1013 (1987).

Notwithstanding the Georgia Supreme Court opinion in *Heublein*, Beam argues that Georgia needs to be deterred because the 1985 Amendment does not comport with the *Bacchus* decision. Beam's attempt to reargue the *Heublein* case here, which case this Court declined to

review, is simply misplaced and misleading.[6] The 1985 Amendment has been declared constitutional and is not at issue in this case. The passage of the 1985 Amendment, therefore, does not signal a disregard by Georgia for the opinions of this Court but, on the contrary, an effort to remedy the perceived infirmities of the pre-*Bacchus* statute.

Retroactive relief of the type sought by Beam is also not necessary to redress the alleged competitive imbalance effected by the pre-*Bacchus* statute. As this Court has noted, "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977) (citations and internal quotations omitted). Indeed, if the decision in *Bacchus* were applied retroactively and Beam received the full refund of taxes that it has sought,[7] then Beam would pay no portion of its share of the tax burden. Certainly, the Commerce Clause was not intended to provide Beam with protection from paying its fair share of taxes.

Since the purpose of the Commerce Clause to promote free trade is not enhanced by retroactive application

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[6] In the 1987 case, Heublein argued that the 1985 Amendment was unconstitutional regardless of its purpose. 256 Ga. at 584, 351 S.E.2d at 196. Contrary to Beam's assertions in this case, Heublein did not fail to challenge the purpose of the statute because of any lack of evidentiary support.

[7] Beam is seeking a refund of *all* taxes that it paid during the refund period.

in this case and the effect of retroactive application might be to relieve Beam of its duty to pay its fair share of the tax burden, retroactive application of *Bacchus* is not favored.

C. Retroactive Application Of *Bacchus* Would "Produce Substantial Inequitable Results."

A balancing of equities in this case, as called for by the third part of the *Chevron Oil* test, clearly favors prospective application of *Bacchus* and the Georgia Supreme Court decision based upon it. As in *ATA*, the State of Georgia collected the taxes at issue in good faith reliance on the precedents of this Court and its own supreme court. As discussed in Part I(A), *supra*, the decision in *Bacchus* marked a sharp departure from longstanding precedents of this Court which Georgia had no reason to expect. Indeed, not even Beam can seriously argue that Georgia acted in bad faith in collecting taxes under the pre-*Bacchus* statute when it did not challenge the statute until April of 1985, almost one year after the decision in *Bacchus*. Certainly, Georgia was entitled to rely on the principles enunciated by this Court in *Young's Market* and reaffirmed by the Court in cases up until the decision in *Bacchus*.

Furthermore, as the Court in *ATA* pointed out, Georgia should "not be faulted for continuing to rely on its statute after its highest state court upheld the constitutionality of the tax." *ATA*, 58 U.S.L.W. at 4709. In *Scott v. State*, the Georgia Supreme Court, relying on the Court's opinions in *Young's Market* and its progeny, upheld the predecessor to the pre-*Bacchus* statute. The decision in

Scott remained unchallenged for forty years until Beam and several other taxpayers challenged the pre-*Bacchus* statute in tax refund actions in 1985. In invalidating the pre-*Bacchus* statute in this case, the Georgia Supreme Court overruled clear past precedent on which the State had reasonably relied.

Armed with a decision of its highest court and long-standing precedents of this Court, Georgia had no reason to foresee a change in the law that would invalidate its statute. As this Court has noted on many occasions, protecting reasonable reliance upon a statute is an important and valid concern, even where "that requires allowing an unconstitutional statute to remain in effect for a limited period of time." *Heckler v. Mathews*, 465 U.S. 728, 746 (1984); *see also Lemon v. Kurtzman*, 411 U.S. 192, 209 (1973) ("[S]tate officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful.")

Protecting reasonable reliance upon a presumptively valid statute is particularly important where retroactive application of a decision threatens extreme financial hardship and disruption of governmental operations. *ATA*, 58 U.S.L.W. at 4709. Retroactive application of *Bacchus* would create substantial economic hardship and disruption for Georgia. Indeed, Georgia would be faced with a tremendous financial burden if it were required to pay some $30,000,000 or more in tax refunds at a time when the state is literally struggling to find revenues to pay for

billions of dollars in infrastructure needs.[8] Furthermore, contrary to Beam's arguments, a retroactive application that required Georgia to issue "credit memos" would be just as burdensome and disruptive, as these "credit memos" would entail substantial administrative costs and lessen already declining revenues of the State. Such financial pressure and disruption would not be justified where the taxes were collected and spent in good faith and where retroactive relief might very well result in a windfall to Beam, who is seeking a total absolution of tax liability for the three years at issue.

In light of Georgia's good faith reliance upon the pre-*Bacchus* statute and the tremendous financial burden a refund would impose on the State, the benefit of a refund to Beam is far outweighed by the harm that would be inflicted upon the State's citizens and government.

II. BEAM IS NOT ENTITLED TO RETROACTIVE RELIEF UNDER THE HOLDING IN *McKESSON*.

Unlike the Florida Supreme Court decision involved in *McKesson*, the Georgia Supreme Court decision at issue here was not based upon established principles of Commerce Clause jurisprudence, but upon a new principle of law. Because this case does not involve the application of

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[8] There are two other pending refund actions which are identical to this case. The plaintiffs in these cases seek refunds in the amount of approximately 28 million dollars. *Heublein, Inc. v. Georgia*, Civil Action No. 87-3542-6 (DeKalb Superior Court filed April 24, 1987) and *Joseph E. Seagram & Sons, Inc. v. Georgia*, Civil Action No. 87-7070-8 (DeKalb Superior Court filed September 4, 1987).

settled principles of law as in *McKesson*, the reasonings and findings in *McKesson* are inapplicable here. *See ATA*, 58 U.S.L.W. at 4708 (application of settled principles of law involves different considerations than application of new law).

The issue before the Court in *McKesson* was whether Florida could give prospective relief only to a taxpayer who had paid taxes under a statute enacted after the decision in *Bacchus*, but which did not surmount the constitutional violations addressed in *Bacchus*. Because the Florida decision invalidating the post-*Bacchus* statute involved "only the application of settled Commerce Clause precedent," the Court did not analyze the decision under *Chevron Oil*, but rather examined Florida's obligation to provide relief under the Due Process Clause. *ATA*, 58 U.S.L.W. at 4708. The Court concluded that Florida had a constitutional duty to provide retroactive relief to McKesson because the taxes at issue were paid under a statute that violated settled principles of law when enacted and implemented and because the taxes were paid under duress. In reaching this conclusion, the Court found that Florida could "hardly claim surprise at the Florida courts' invalidation" of the post-*Bacchus* statute as it was essentially identical to the scheme invalidated in *Bacchus*. *McKesson*, 58 U.S.L.W. at 4673. The Court also found that Florida failed to take reasonable precautions to limit its liability in that it continued to require McKesson to pay taxes under the statute even after the statute had been declared unconstitutional by the lower court.[9]

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[9] After the trial court declared that the statute was unconstitutional, Florida appealed the decision which resulted in a

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Legally and factually, the instant appeal is completely different from *McKesson*. As discussed in depth in Section I(A), this case involves the application of a new principle of law as established in *Bacchus*. The statute at issue in this case was enacted prior to *Bacchus* and was implemented in good faith in reliance on the precedents of this Court and of the Georgia Supreme Court. Not until the decision in *Bacchus* did Georgia have any reason to question the validity of its statute. On the contrary, the statute at issue in *McKesson* was enacted after *Bacchus* with full knowledge of the principles established in that case. Because this appeal involves a pre-*Bacchus* statute, as opposed to a post-*Bacchus* statute, the analysis employed in *ATA*, not *McKesson*, governs.

In addition to involving the application of a new principle of law, the instant case is distinguishable from *McKesson* in a number of other significant ways. In *McKesson*, the taxpayer challenged Florida's post-*Bacchus* statute while it was in effect and paid taxes thereunder throughout the period that it was challenging the statute. Even after the trial court declared the statute to be unconstitutional, McKesson was required to continue paying the discriminatory tax. *See supra* n.9.

On the contrary, Beam did not challenge the Georgia statute until all the taxes at issue had been paid and the

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stay of the trial court's decision. Florida continued to collect the tax while the decision was being appealed and did not join in McKesson's motion to vacate the stay. Furthermore, Florida successfully opposed McKesson's efforts to have the taxes escrowed during the litigation. 58 U.S.L.W. at 4667, n.5.

statute had been repealed. Unlike McKesson, Beam did not seek any predeprivation remedy such as injunctive relief or the establishment of an escrow fund into which the import tax could have been paid. Beam simply paid the taxes at issue without any protest and without any threatened enforcement action by the State. In short, the circumstances under which McKesson paid its taxes to Florida and which prompted the Court to find that the taxes were paid under duress do not exist in this case.[10]

The instant appeal bears no resemblance to the case before the Court in *McKesson* and thus *McKesson* is not controlling here. Because this case involves the application of new principles of law, Georgia is not obligated to provide Beam with a backward looking remedy.

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[10] Taxes paid prior to *any* enforcement action are not paid under duress. *See, e.g., United States v. New York & Cuba Mail Steamship Co.*, 200 U.S. 488 (1906) (payment of an illegal demand with full knowledge of the facts rendering it illegal, without any coercion by actual or threatened action by the government, is a voluntary payment and not one made under duress); *cf. Ward v. Board of County Commissioners*, 253 U.S. 17, 23 (1920) (taxes were paid involuntarily where they were tendered to avoid a distress sale of the taxpayer's property).

CONCLUSION

The Georgia Supreme Court correctly applied the *Chevron Oil* test to its decision invalidating O.C.G.A. § 3-4-60, as it existed during the claim period, and, in so doing, properly denied a refund to Beam. Accordingly, based on the arguments presented herein, it is respectfully requested that the Court affirm the ruling of the Georgia Supreme Court.

Respectfully submitted,

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No. 89-680

In The

Supreme Court of the United States

October Term, 1990

JAMES B. BEAM DISTILLING CO.,

Petitioner,

v

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE I. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Respondents.

On Petition For Certiorari To The Supreme Court Of Georgia

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ARGUMENT

I. BEAM IS ENTITLED TO RETROACTIVE RELIEF UNDER THE REASONING OF EITHER THE PLURALITY OR DISSENT IN *AMERICAN TRUCKING ASSOCIATIONS, INC. V. SMITH*

In *American Trucking Associations, Inc. v. Smith*, 58 U.S.L.W 4704 (U.S. June 4, 1990) (No. 88-325) ("*ATA*"), this Court was divided on the issue, whether constitutional decisions of the Court can ever apply only prospectively in pending civil cases. The plurality opinion, authored by Justice O'Connor, applied the criteria set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) ("*Chevron Oil*"), for determining when a constitutional decision would not follow the general rule of retroactive application. Justice Scalia, concurring only in the Court's judgment in *ATA*, stated his opinion, "Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense." *ATA, supra*, 58 U.S.L.W. at 4714. Joining Justice Scalia's opinion that constitutional substantive law must receive retroactive and prospective application, Justice Stevens authored the dissent in *ATA*, in which three other Justices joined. The dissent expressed the opinion that "Petitioners are entitled to an adjudication of the constitutionality of the Arkansas tax under our best *current* understanding of federal law regardless of the good faith of the Arkansas legislators." *Id.*, 58 U.S.L.W. at 4715 (emphasis in original). Thus, five of the nine Justices in *ATA* expressed the view that substantive constitutional law by its nature must always

apply retroactively. Regardless of which of these opinions embodies the ultimate view of the Court on the issue of retroactivity in general, Beam is entitled to retroactive *relief* in the instant case.

A. Beam is Entitled to Retroactive Relief Under the Analysis of the Plurality in *ATA*

As is discussed more fully below and in Argument II of Beam's original brief at pages 19-42, Beam is entitled to retroactive relief under the analysis of the *ATA* plurality and the criteria of *Chevron Oil*.

1. Bacchus did not overrule prior precedent or establish any new rule that had not been clearly foreshadowed.

This Court's last pertinent application of the *Chevron Oil* criteria occurred in *Ashland Oil, Inc. v. Caryl*, 58 U.S.L.W. 3832 (U.S. June 28, 1990) (No. 88-421) ("*Ashland Oil*"). In *Ashland Oil*, the Court relied upon the opinions of both the plurality and the dissent in *ATA* in reaching the result of retroactive application of the decision at issue, namely *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984). Thus, the Court issued a *per curiam* opinion in *Ashland Oil*. In addressing the State's argument under *Chevron Oil* that *Armco* was so revolutionary that it should be accorded prospective application only, this Court stated:

> In *Armco*, . . . the Court relied on *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 322, n. 12 (1977), which held that a State "may not discriminate between transactions on the basis of some interstate element." On its face, West Virginia's statutory scheme had just such a discriminatory effect, as it "provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it."
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> * * *
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> *Armco* unquestionably contributed to the development of our dormant Commerce Clause jurisprudence. . . . In adopting the internal consistency test, *Armco* extended that doctrine beyond the context in which it had originated. *See* 467 U.S., at 648 (REHNQUIST, J., dissenting). Nevertheless, *Armco* neither overturned established precedent nor decided "an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil, supra*, at 106. To be sure, *Armco* paved the way for *Tyler Pipe Industries, Inc. v. Washington State Dep. of Revenue*, 483 U.S. 232 (1987), which arguably "overturn[ed] a lengthy list of settled decisions" and "revolutioniz[ed] the law of state taxation," *id.*, at 257 (SCALIA, J., concurring in part and dissenting in part), by extending the internal consistency test. *Armco* itself, however, was not revolutionary.

Ashland Oil, supra, 58 U.S.L.W. at 3832 (footnotes and citations omitted in part).

As is recognized by the State of California in its *amicus* brief filed in the instant matter, the test for determining when the first prong of the *Chevron Oil* test has been met is very narrow. *Amicus* Brief of California, et al., at 5.[1] This is so because the presumption with respect to

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[1] The State of California stated:

> Amicus California respectfully urges the Court to exercise restraint in interpreting the first prong of

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decisions of this Court is in favor of retroactive application. Brief of the Petitioner at p. 20. At most, *Chevron Oil* established a set of three criteria for the aberrational case where that presumption would not apply.[2]

Even a cursory review of this Court's modern day opinions makes clear that the State's purported reliance upon the cases of the 1930's is misplaced. *Craig v. Boren*, 429 U.S. 190 (1976), left no doubt that the broad statements in dicta in *Mahoney v. Joseph Triner Corporation*, 304 U.S. 401 (1938), that the Equal Protection Clause of the Fourteenth Amendment did not apply in the context of Twenty-first Amendment regulation were not the law. Similarly, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) ("*Midcal*") left no reasonable doubt that similar broad statements in *State Board of Equalization v. Young's Market*, 299 U.S. 59 (1936),

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> the *Chevron* test in what appears to be an increasingly narrower manner leading to few or no situations where a decision would apply prospectively only. The direction of this Court suggests that ultimately, perhaps the only situation in which that prong would be satisfied is where one United States Supreme Court decision is expressly overruled in a majority opinion of a later United States Supreme Court decision.

Amicus Brief of California, et al., at 5.

[2] As is demonstrated in *ATA* and *Ashland Oil*, whether *Chevron Oil* even applies to determine retroactivity of federal constitutional law in pending civil cases remains unsettled. Based upon the concurring and dissenting opinions of five Justices, it would appear that *Chevron Oil* does not apply.

on which the State relies heavily, renouncing the Commerce Clause in the context of Twenty-first Amendment regulation were likewise not the law.

Craig v. Boren left a flicker of life in the assertion outlined in the dictum analysis in *Young's Market* that the states were unfettered by the Commerce Clause when acting under the aegis of the Twenty-first Amendment. In distinguishing *Mahoney* and *Young's Market*, the Court in *Craig v. Boren* noted that:

> [T]he arguments in both cases centered upon importation of intoxicants, a regulatory area where the State's authority under the Twenty-first Amendment is transparently clear, *Hostetter v. Idlewild Bon Voyage Liquor Corp., supra*, 377 U.S. at 330, and n.9, and touched upon purely economic matters that traditionally merit only the mildest review under the Fourteenth Amendment . . . . Cases involving individual rights protected by the Due Process Clause have been treated in sharp contrast.

Id., 429 U.S. at 462. The State suggests in its brief that this language distinguishes *Craig v. Boren* from the instant case, and insulates Georgia's protectionist scheme from pre-*Bacchus* scrutiny.

However, *Midcal* made clear in 1980 that while the *Young's Market* analysis may yet hold with respect to state laws governing *"whether to permit importation or sale of liquor* and *how to structure the liquor distribution system,"* laws outside the confines of those two categories are

"subject to the federal commerce power in appropriate situations." *Midcal*, 455 U.S. at 110 (emphasis supplied).[3]

The clear mandate of *Midcal* is that where the State's regulation impacting interstate commerce has nothing to do with determining whether it will allow the importation or sale of alcohol or how it will structure the distribution system, a balancing of competing federal and state interests must follow. Georgia's pre-*Bacchus* statute clearly does not fall into either of these two categories. Thus, the State's interests must be balanced against the federal interests under the mandate of *Midcal*. Since the State's purpose behind the legislation was pure economic protectionism and the effect of the statute was to bolster local business interests to the detriment of out-of-state business interests, making the legislation practically *per se* invalid under the Commerce Clause, Joint Appendix ("J.A.") at 101, the State had no reason to believe that its interests would survive such a balancing.

As the unanimous Court held in *Ashland Oil*, the notion that a State may not discriminate between intrastate and interstate commerce through taxation is not new. As in *Armco*, the *Bacchus* Court relied on the cardinal rule that "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' " *Bacchus Imports, Ltd. v. Diaz*, 468 U.S. 263, 268 (1984) ("*Bacchus*") (quoting *Boston*

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[3] *Midcal's* pronouncement on this issue was nothing new. The Court squarely rejected the notion that the Twenty-first Amendment repealed the Commerce Clause in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964).

Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 329 (1977) and *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)). The *Bacchus* Court accordingly had no difficulty in reaching its holding: "It is therefore *apparent* that the Hawaii Supreme Court erred in concluding that there was no improper discrimination against interstate commerce. . . . " *Bacchus, supra*, 468 U.S. at 272 (emphasis supplied).[4]

Despite clear and firmly established law prohibiting discrimination through taxation, and despite the clear language of *Midcal* requiring a balancing of the state and federal interests implicated by the pre-*Bacchus* statute, the State argues that it was entitled to ignore completely all decisions of this Court under the Commerce Clause unless those decisions also involved intoxicating beverages. In other words, the State closes its eyes to the precedent of this Court set forth in *Midcal*, and advances its own unwarranted extension of cases that predated *Midcal*. The State's decision to ignore federal interests under the Commerce Clause despite the clear mandate of *Midcal* and long-standing principles opposing discriminatory taxation is little more than a poor attempt to create a subterfuge. In doing so, the State now wishes to avoid any adverse ramifications to itself by claiming that it was entitled to place blinders over its eyes with respect to law

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[4] This is in sharp contrast to the *Scheiner* decision at issue in *ATA*, because in *Scheiner*, both the majority and the dissent recognized that the majority's opinion constituted a substantial departure from prior law. *American Trucking Ass'n v. Scheiner*, 107 S.Ct. 2829, 2847 and 2848 (O'Connor, J., dissenting).

under the Commerce Clause while charging Beam $2.5 million pursuant to an illegal statute. Such a result should not be countenanced.[5]

The State's attempt to apply the *Chevron Oil* criteria to this case so as to yield non-retroactive application shaves hairs too finely, so much so, in fact, that if the State's analysis were correct, almost all decisional authority would establish "a new principle of law" under *Chevron Oil*, and thus the presumption of retroactivity would be turned on its head. In its brief, the State asserts, "[A]t no time before the 1984 decision in *Bacchus* did the Court find that the Commerce Clause alone limits a state's right to regulate the importation of alcoholic beverages into its borders." Brief for Respondents at pp. 15-16. In attempting to establish this distinction of *Bacchus* from prior case law, the State completely ignores the delineation set forth by this Court in *Midcal* as discussed above. Acknowledging three categories of Supreme Court authority that limit the states' power to regulate under the Twenty-first Amendment, the State uses this narrow distinction between *Bacchus* and those authorities in an attempt to

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[5] At the most, *Bacchus* was an extension of *Midcal*. *Midcal* had already held that with regulation such as that at issue here, the State's interests under the Twenty-first Amendment must be weighed against the federal interests under the Commerce Clause. The Commerce Clause interests were clear. The fact that *Bacchus* extended the rationale of the cases upon which it relied does not bring *Bacchus* within the ambit of new law as described in *Chevron Oil*. *See Ashland Oil*, as quoted *supra* at pp. 2-3.

sustain its proposition that *Bacchus* established a "new principle of law."

The linchpin of the State's argument is found at page 16 of its Brief in the following statement:

> The cases in which the Court recognized limitations [on a state's exercise of its Twenty-first Amendment powers] basically fall within three groups: (1) those cases in which the state attempted to regulate alcoholic beverages travelling *through* the state but not *into* the state for use therein; (2) those cases in which the state's regulatory authority conflicted with federal regulatory laws enacted under the Commerce Clause; and (3) those cases in which the state's regulatory authority conflicted with a provision of the Constitution other than the dormant Commerce Clause.

Resp. Brf. at p. 16 (footnote omitted.) The State argues that because *Bacchus* does not come within any of those three categories it established "a new principle of law" and, thus, under *Chevron Oil*, should not be given retroactive application. The fatal flaw with the State's analysis is that the categories are too narrowly drawn to give *Chevron Oil* and the presumption of retroactivity any real meaning.

Chevron Oil does not prescribe non-retroactivity in cases "whose resolution had not already been decided on their precise facts" but rather "whose resolution was not clearly foreshadowed". *Chevron Oil*, 404 U.S. at 106. If the former situation were subsumed under the *Chevron Oil* criteria, almost no decision would be applied retroactively, which is obviously not the case. In short, the

distinctions between *Bacchus* and the decisions that presaged it are so narrow that a ruling that it was not clearly foreshadowed by those decisions would improperly limit *Chevron Oil* to only those cases expressly overruling prior decisions, which is clearly not what *Chevron Oil* would prescribe.

For example, the State's argument hinges upon the wholly unsubstantiated proposition inherent in category (2), above, that federal interests pursuant to a statute promulgated under the authority of the Commerce Clause exceed the federal interests in promoting competition inherent in the Constitution itself. The State argues that the federal interest is greater when pursued through a statute enacted pursuant to the Commerce Clause than in the so-called negative Commerce Clause area, where Congress has not expressly exercised the federal authority over interstate commerce in the form of positive legislation. See generally the State's discussion of *Midcal* at pages 17 and 18 of its brief. *Midcal* voided California's price maintenance system, which conflicted with the Sherman Act, passed by Congress pursuant to the Commerce Clause authority. The State would distinguish *Midcal* on the basis of the absence in the instant case of any conflicting federal legislation. However, there is simply no support for this proposition in the case law. The "dormant" Commerce Clause cases clearly establish a federal procompetition interest implicit in the Commerce Clause itself that is coextensive with Congress's authority under that Clause.

In *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), this Court expressly rejected the very two-tiered distinction

the Respondents seek to make between *Midcal* and *Bacchus, i.e.*, that the sweep of the Commerce Clause is much more limited where Congress has not animated its potential through legislation. "We think the [state] court misread our cases, and thus erred in assuming that they require a two-tiered definition of commerce." *Id.*, 437 U.S. at 622. "In the absence of federal legislation, these subjects [of local character] are open to control by the states *so long as they act within the restraints imposed by the Commerce Clause itself.*" *Id.* at 623 (citing *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440 (1978) (emphasis supplied)). Similarly, "the Commerce Clause has been interpreted by the Court not only as an authorization for congressional action, but also, even in the absence of a *conflicting federal statute*, as a restriction on permissible state regulation." *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1978) (emphasis supplied). *See also Tyler Pipe Industries v. Washington State Dept. of Revenue*, 107 S.Ct. 2810 (1987) (facially discriminatory scheme excepting manufacturers selling locally from wholesale tax with no corresponding exception for wholesale taxes paid to other states violates the dormant Commerce Clause); *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984) (wholesale gross receipts tax from which local manufacturers are exempt violates the dormant Commerce Clause – "It has long been established that the Commerce Clause *of its own force* protects free trade among the states. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977). . . . " (emphasis supplied)); *Northwestern States Portland Cement Company v. Minnesota*, 358 U.S. 450, 458 (1958) ("It has been a long established doctrine that the Commerce Clause gives exclusive power to the Congress

to regulate interstate commerce, and its failure to act on the subject in the area of taxation nevertheless requires that interstate commerce shall be free from any direct restriction or imposition by the States," *citing Gibbons v. Ogden*, 9 Wheat. 1 (1824)).

Midcal refined the analysis in this area so as to validate the intrusion of state authority into the void for certain narrow, limited purposes under the Twenty-first Amendment, but the instant case falls squarely outside those narrow purposes. The statute in this case in no way seeks to prohibit the importation of alcohol into the State of Georgia or to craft a distribution system. Rather, it simply seeks to impede importation so as to protect and ensure the economic well-being of those who are engaged in the local production of alcoholic beverages.

Surely, when *Craig v. Boren* and *Midcal* outlined the narrow realms within which the states are immune from Commerce Clause strictures, it became obvious that the federal interest in interstate competition is paramount in areas in which the states' only interest is *per se* invalid local protectionism. The Georgia courts themselves have found the pre-*Bacchus* statute at issue in this case to embody discriminatory purpose and effect. *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 382 S.E.2d 95 (1989). *See also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36-37 (1980); and *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

Midcal, in and of itself, disposes of the State's erroneous argument that "[i]n *Bacchus*, the Court recognized for the first time the existence of 'central purposes'

underlying the Twenty-first Amendment, which purposes did not include permitting 'states to favor local liquor industries by erecting barriers to competition.' " Resp. Brf. at p. 7. In *Midcal*, the California state court "found little correlation between resale price maintenance and temperence." 445 U.S. at 112. This Court endorsed the state court's conclusion drawn from this finding that "the asserted state interests are less substantial than the national policy in favor of competition." *Id.* at 113. The Georgia courts here have concluded that the purpose behind the statute in issue was nothing more than local protectionism. The implications of *Midcal* for this case are clear and certain. The State's attempt to distinguish *Midcal* is hopelessly flawed.

2. The State's argument that retroactive application would not further the purposes of the Commerce Clause is circular.

The State argues in its Brief, beginning at page 21, that because the pre-*Bacchus* statute at issue here was a "legitimate state taxation of interstate commerce" prior to the *Bacchus* decision, the purposes animating the Commerce Clause would not be furthered by retroactive application of *Bacchus*. This argument presupposes that Georgia's blatantly protectionist measure in fact constituted "legitimate state taxation of interstate commerce," which of course entirely begs the very question on appeal in this case. The State's argument amounts to a tacit acknowledgement that if the State does not prevail in its argument that *Bacchus* established a new principle of law, this Court need proceed no further in analyzing the *Chevron Oil* criteria. The State seeks to bolster its circular

argument with the proposition that retroactive application will not deter further abuses by Georgia since the State has already amended the offending statute. Resp. Brf. at p. 22. That argument rings particularly hollow in the wake of admissions by the State's own agents that the purpose and effect of the new statute do not vary from that of the old – pure local protectionism.[6] Even less impressive than the State's protest that it has amended the offending statute is its assertion at page 23 of its brief that if *Bacchus* is applied retroactively Beam would pay no portion of its share of the tax burden. It is true that Beam sought a refund of *all* of the taxes it paid pursuant to the offending statute. However, that is simply the relief that the State provided under its refund statute, which the Supreme Court of Georgia declined to enforce. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 58 U.S.L.W. 4665 (U.S. June 24, 1990) (No. 88-192), thoroughly discussed below and by Beam in its initial brief, provides ample opportunity for the State to fashion a refund remedy that will ensure that Beam shoulders its fair share of the tax burden.

3. The record does not support the assertion that retroactive application of *Bacchus* would produce substantial inequitable results.

Beginning at pages 25-26 of its Brief, the State argues under the opinion of the *ATA* plurality that retroactive

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[6] As stated by the State's Senior Assistant Attorney General in reference to the post-*Bacchus* statute, "[T]he real desire even in the new legislation is to favor local alcohol industries. . . . " S.R. at p. 27.

application of *Bacchus* would create substantial economic hardship for Georgia. First, *McKesson* makes clear that the State can fashion a remedy requiring it to refund *no money*. In fact, pursuant to *McKesson* the State is well within its rights to *increase* its revenues by collecting retroactively taxes not paid by the beneficiaries of the discriminatory taxing scheme. In short, even if it were true, as the State suggests, that "the State is literally struggling to find revenues to pay for billions of dollars in infrastructure needs," there is simply no reason to believe that the State's compliance with *McKesson* will significantly disrupt the State's efforts in that respect.

Moreover, the record in no way supports the State's suggestion that it would experience such a struggle. The only evidence upon which the State relies is that other refund actions are pending. Resp. Brf. at 25. The State has not submitted any evidence to this Court or to any other to show what percentage of its budget is potentially implicated by the instant suit, or of any particular fiscal problem that the State is experiencing. The State has not sought to analyze the methods available to it to raise additional revenues. In short, the State cannot assert on this record that it would suffer any particular hardship by virtue of retroactive relief in favor of Beam.

B. Under Justice Scalia's Opinion in *ATA*, Beam is Entitled to Retroactive Relief

Under Justice Scalia's concurring opinion in *ATA*, the Court should address the constitutionality of the statute by applying the Court's current understanding of federal

law. The State has practically admitted for purposes of this appeal that the statute is unconstitutional under *Bacchus*. Moreover, as shown in Beam's discussion in Argument II of its original brief and the discussion below, application of the Court's understanding that the Georgia statute at issue is and was at all pertinent times unconstitutional would not upset the State's settled expectation based upon principles of *stare decisis*.

C. Under the Reasoning of the Dissent in *ATA*, Beam is Entitled to Retroactive Relief

Under the opinion of the dissent in *ATA*, the Court should go straight to the due process issues addressed in *McKesson*, as Beam has done in its original brief. Pet. Brf., Argument I at 15-19. This is so because *Bacchus* clearly sets forth the Court's best current understanding of federal law on the issue of the constitutionality of Georgia's pre-*Bacchus* statute. Under this understanding, the pre-*Bacchus* statute is clearly unconstitutional.

Indeed, the Georgia Supreme Court and the trial court so held in both their opinions. As the Georgia Supreme Court stated:

> In the proceedings below, the trial court determined that the pre-1985 statute was unconstitutional because it violated the Commerce Clause of the U.S. Constitution. The court further held that the ruling would only be applied prospectively so that Beam is not entitled to a refund. We affirm.

J.A. at pp. 100-01. Relying upon *Bacchus*, the Georgia Supreme Court affirmed the trial court's holding that the pre-*Bacchus* statute was unconstitutional. In accordance with the dissent in *ATA*, the Georgia Supreme Court applied its "best *current* understanding of federal law," *ATA, supra*, 58 U.S.L.W. at 4715, in ruling as a substantive matter that the pre-*Bacchus* statute was unconstitutional. The Georgia Supreme Court then correctly determined that the decision whether to accord Beam any retroactive relief was a remedial decision. The court erred, however, when it held as a matter of remedy, only, that it would not accord Beam any retroactive relief despite the tax statute's constitutional infirmity. J.A. at p. 105. Under the law of *McKesson, supra*, which is indisputably founded upon longstanding principles of federal due process law, *see* Pet. Brf. at 16-19, Beam is entitled to some form of retroactive remedy. The flexibility with which the State may accord such a remedy within the confines of federal due process is described in *McKesson*, 58 U.S.L.W. at 4671. Whatever remedy the State applies, it must be "clear and certain," requiring the State to "ensure that the tax as *actually imposed* on petitioner and its competitors during the contested tax period does not deprive petitioner of tax moneys in a manner that discriminates against interstate commerce." *McKesson*, 58 U.S.L.W. at 4671, 4672 (emphasis in original, footnote omitted).

The unanimous Court in *McKesson* declined to rule on the issue, whether the "State's reliance on a 'presumptively valid statute' was a relevant consideration of [the

State's] obligation to provide relief for its unconstitutional deprivation of property," 58 U.S.L.W. at 4672, finding instead that Florida had not relied upon a presumptively valid tax when it adopted its post-*Bacchus* liquor tax statute. As the discussion in section II.A. of Beam's original brief and the discussion above in section I.A.1. clearly demonstrate, the State of Georgia likewise had no reasoned basis for believing by 1982 that the pre-*Bacchus* statute was constitutional.[7] The State of Georgia cannot now argue that it relied on a presumptively valid statute in the two-and-one-half years prior to *Bacchus* and the half year after *Bacchus*.

II. THE STATE HAS FULLY FAILED TO ADDRESS THE TAXES PAID BY BEAM AFTER *BACCHUS* WAS DECIDED

Apparently conceding that the State has no basis for refusing to grant Beam a remedy for taxes paid by Beam after *Bacchus* was decided, the State has not responded to Argument III set forth in Beam's original brief at 42-43.

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[7] The State makes much of the fact that Beam "never paid its tax under protest or sought any protection from paying the tax." Brief of Respondents at 5. *See also id.*, at 21 and 28-29. The State completely ignores the lack of any procedure for paying the tax under protest in Georgia law. Moreover, payment of the tax was a precondition to doing business in the State of Georgia. *McKesson* leaves no doubt that under these circumstances, Beam paid the taxes under duress. The lack of pre-deprivation process entitles Beam to a post-deprivation remedy.

Unquestionably, Beam is entitled at the very least to relief for taxes paid after *Bacchus* was decided.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES B. BEAM DISTILLING CO.,
Petitioner,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE I. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,
Respondents.

On Writ of Certiorari to the Supreme Court of Georgia

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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Pursuant to Rule 37.2 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of respondents. Respondents have consented to the filing of the brief. Petitioner has denied consent.

The *amici* are organizations whose members include state, county, and municipal governments and officials

throughout the United States. They have a compelling and continuing interest in the issue presented here: whether retroactive monetary relief must be made available whenever a state tax is held unconstitutional. As this Court itself has noted, its jurisprudence under the Commerce Clause and other provisions of the Constitution that may restrict state taxing authority is at times confusing and unpredictable; that problem is compounded by the changing nature of many state economies, which poses novel problems for state and local taxing authorities. These factors make it inevitable that state and local taxing schemes, even when enacted in good faith reliance on standing precedents of this Court, occasionally will be held unconstitutional. If refunds are compelled in such circumstances, state and local governments will face not only revenue shortfalls but also unexpected and potentially ruinous liability. At the same time, the prospect of disruptive refund liability will discourage States and local governments from tapping constitutionally permissible sources of funds.

Because the issues presented by this case are of exceptional importance to *amici* and their members, *amici* respectfully move for leave to file the attached brief in support of respondents.

Respectfully submitted,

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August 29, 1990

QUESTION PRESENTED

Whether the rule set out in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), should be applied retroactively.

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INTEREST OF THE *AMICI CURIAE*

The interests of the *amici* are set forth in the motion accompanying this brief.

STATEMENT

1. In 1938, shortly after ratification of the Twenty-first Amendment, Georgia adopted the predecessor to the tax at issue in this case, O.C.G.A. § 3-4-60 (Michie 1982). See 1937-38 Ga. Laws (Ex. Sess.) 103. In relevant part,

the statute taxed alcoholic beverages imported from out-of-state at higher rates than similar products manufactured in-state. The tax immediately was challenged on Commerce Clause grounds; it was upheld by the Georgia Supreme Court, which relied on this Court's interpretation of the Twenty-first Amendment. *Scott v. Georgia*, 2 S.E.2d 65, 66 (Ga. 1939) (citing *Finch & Co. v. McKittrick*, 305 U.S. 395 (1939); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1939); *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936)), overruled on other grounds, *Blackston v. Georgia Dep't of Natural Resources*, 334 S.E.2d 679 (Ga. 1985). In the form challenged here, the statute imposed a tax of $1.00 per liter on distilled spirits, and $1.40 per liter on alcohol, imported into the State; it imposed a tax of $.50 per liter on distilled spirits, and $.70 per liter on alcohol, manufactured in Georgia from Georgia-grown products. O.C.G.A. § 3-4-60 (Michie 1982).

In 1985, in response to this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which invalidated a similar Hawaii liquor tax, Georgia repealed the 1982 version of O.C.G.A. § 3-4-60 and replaced it with a direct tax on the importation of liquor. 1985 Ga. Laws 665, O.C.G.A. § 3-4-60 (Michie Supp. 1989). This tax also was challenged and upheld by the Georgia Supreme Court; this Court dismissed the subsequent appeal for want of a properly presented federal question. *Heublein, Inc. v. Georgia*, 351 S.E.2d 190 (Ga.), app. dismissed, 483 U.S. 1013 (1987). The constitutionality of the post-*Bacchus* tax is not at issue here.

2. In 1985, petitioner brought suit in state court, challenging the constitutionality of the 1982 version of O.C.G.A. § 3-4-60 under the Commerce and Equal Protection Clauses, and seeking refunds for taxes paid in 1982, 1983, and 1984. Applying *Bacchus*, the trial court concluded that the statute had violated the Commerce Clause because "the purpose of [the tax], as it existed

during the years in question, was economic protectionism." Pet. App. Ex. C, at 9. The court went on to hold, however, that its decision would be applied only prospectively. Looking to the three-part test for retroactivity set out by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the trial court concluded that its decision "establishes a new principle of law." Pet. App. Ex. C, at 14. The court also noted that "the offending statute was amended in 1985 to remove its Constitutional infirmities and no effort will be made hereafter to assert its validity by defendants"; the court added that retroactive application of its decision would have "'unjust results.'" *Ibid.* (citation omitted). The court accordingly found that petitioner was not entitled to a refund. *Id.* at 15-16.

On appeal, the Georgia Supreme Court agreed both that the tax had been unconstitutional (Pet. App. Ex. A, at 2) and that the holding of unconstitutionality should be given only prospective effect. The court noted that it had adopted the *Chevron Oil* test for retroactivity. *Ibid.* The first prong of the test was satisfied here, the court explained, because a decision striking down the tax in 1984 "would certainly have overruled past precedent"; the court added that, "[d]uring the time that the taxes at issue here were collected, the State had no reason to believe that the import taxes were unconstitutional." *Id.* at 3. The Court found that there was no need to address the second prong of the *Chevron Oil* test because the challenged statute had been repealed in 1985. *Ibid.* Finally, the court concluded that the equities made retroactive application of its decision inappropriate, explaining that the State had collected the taxes "in good faith under an unchallenged and presumptively valid statute." The court also noted that "[p]rospective application would avoid imposing a severe financial burden on the State and its citizens." *Id.* at 4.[1]

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[1] Justice Smith dissented from the retroactivity holding on state law grounds, criticizing the majority for "rely[ing] on United

SUMMARY OF ARGUMENT

1. This case presents the issue that divided the Court in *American Trucking Ass'ns, Inc. v. Smith*, 110 S.Ct. 2323 (1990) ("*ATA*"); the dispositive question here is whether to follow the approach to retroactivity propounded by the *ATA* plurality or the *ATA* dissent. In our view, the plurality's analysis—which uses the test of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), to determine the retroactive applicability of decisions announcing new rules—is preferable. That approach accords with what had been the general understanding of the Court's retroactivity decisions, and is derived from longstanding principles of *stare decisis*. The plurality's conclusion also draws substantial support from the Court's refusal to apply new constitutional decisions in habeas corpus proceedings, which involves a recognition that the policies of finality and reliance may justify disregard of "current constitutional law." *Mackey v. United States*, 401 U.S. 667, 686 (1971) (opinion of Harlan, J.).

Similar considerations militate against the retroactive application of new constitutional principles in cases involving state taxation. Requiring refunds when the invalidated tax had seemed consistent with this Court's precedents could have profoundly disruptive effects on States and the public. It also would subject state courts and taxing officials to extraordinarily awkward and conflicting obligations. State courts are obligated to apply this Court's decisions until the Court itself sets them aside, while state officials typically are bound to enforce presumptively valid laws until directed otherwise by the courts; if States may be forced to surrender funds collected pursuant to such statutes, the ability of governments to plan and carry out their operations will be seriously compromised.

States Supreme Court decisions that are not on point and in which the Georgia Constitution was never discussed or considered." Pet. App. Ex. A, at 12.

2. Under the *Chevron Oil* test, the decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), should not be applied retroactively. The Court in *Bacchus* noted early decisions under the Twenty-first Amendment that supported the constitutionality of the challenged tax (see *id.* at 274-275 & n.13); the Court's decision left very little of those precedents standing. Indeed, three Justices were of the view that the Court's decision in *Bacchus* was inconsistent with a "square[]" contrary holding and rested on "a totally novel approach" to the Twenty-first Amendment. *Id.* at 282, 286-287 (Stevens, J., dissenting). That is enough to dispose of this case: if three Justices believe that a decision of the Court departs from longstanding precedent, state legislators and taxing officials hardly can be faulted for failing to anticipate that decision.

In any event, a review of this Court's holdings makes clear that *Bacchus* did set out a new principle of law within the meaning of the first prong of the *Chevron Oil* test. The Court's earliest Twenty-first Amendment opinions squarely held that Commerce Clause restrictions do not apply to state taxation or regulation of liquor that is destined for consumption within the taxing State's borders. Until the time of the decision in *Bacchus*, the Court continued to affirm that principle, and repeatedly cited its early decisions with apparent approval. Georgia accordingly was entitled to rely on those decisions—which were, of course, the basis for the state Supreme Court's 1939 holding that the challenged tax was constitutional. The outcome under the second and third prongs of the *Chevron Oil* test is equally clear. As the *ATA* plurality explained, constitutional policies are not advanced by retroactively invalidating a tax that, when enacted and enforced, was consistent with this Court's precedents. Similarly, the equities cut powerfully against unsettling actions taken in good faith reliance on this Court's decisions.

ARGUMENT

THE RULE ANNOUNCED BY *BACCHUS* SHOULD NOT BE APPLIED RETROACTIVELY.

At the outset, it is useful to bear in mind the issues that are *not* involved in this case. *First*, the Court need not address the extent to which States may assert sovereign immunity to bar constitutional claims brought against them in their own courts under state causes of action. Despite petitioner's hints to the contrary, however, it is worth noting that the Constitution never has been understood to guarantee monetary relief as a remedy for all constitutional violations. From its inception, our system has recognized sovereign and implied immunities—some created by this Court—that may make it impossible for injured parties to obtain money damages.[2] This understanding plainly survives the Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S.Ct. 2238 (1990), which held that the Due Process Clause obligates States to provide a remedy for the collection of unconstitutional taxes; because the State had waived its immunity, the Court in *McKesson* specifically declined to address the extent to which restrictions on such waivers may limit the relief available. See *id.* at 2257 n.34. Given Georgia's broad waiver of immunity, the issue similarly is not present here. See O.C.G.A. § 48-2-35(a).

Second, this case does not involve any challenge to the established understanding that refunds are unavailable

[2] While the specific question whether a State's sovereign immunity may bar federal constitutional claims advanced against it in state court has been infrequently litigated, on those occasions when the Court has reached the issue it consistently has indicated that "without [a State's] consent it cannot be sued in any court, by any person, for any cause of action whatever." *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 642 (1911). See also, *e.g.*, *Palmer v. Ohio*, 248 U.S. 32, 34 (1918); *Cunningham v. Mason & Brunswick R.R.*, 109 U.S. 446, 451 (1883); *Railroad Co. v. Tennessee*, 101 U.S. 337, 339 (1880); *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858).

to taxpayers who fail to comply with state statutes of limitations or rules requiring notice, payment under protest, or exhaustion of administrative remedies. Petitioner seemingly acknowledges the force of this principle (Br. 41-42), which was reaffirmed in *McKesson*. 110 S.Ct. at 2254-2255 & n.28. See also, *e.g.*, *Jimmy Swaggart Ministries v. Board of Equalization*, 110 S.Ct. 688, 700 (1990); *Ward v. Love County*, 253 U.S. 17, 22-23, 25 (1920).[3] There is no novelty to this conclusion: the Court has made clear in a variety of settings that preservation of a federal constitutional claim may be conditioned on compliance with nondiscriminatory state procedural rules. *See, e.g.*, *Swaggart*, 110 S.Ct. at 700; *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978). Similarly, this case does not pose the question whether a State must provide a refund remedy if it allows taxpayers to contest the imposition of a tax prior to payment. See *McKesson*, 110 S.Ct. at 2250-2251 & n.21.

Third, this case is not controlled by *McKesson*. The Florida tax there at issue was enacted *after* this Court's decision in *Bacchus*, see 110 S.Ct. at 2243, and the levy accordingly was inconsistent with settled law from the outset. See *id.* at 2247 n.15; *American Trucking Ass'ns, Inc. v. Smith*, 110 S.Ct. 2323, 2332 (1990) (*"ATA"*). Although petitioner struggles mightily to confuse the issue (see Br. 5-8, 15, 18), this case, in contrast, involves a statute enacted *prior* to the decision in *Bacchus*. See Pet. Br. 32-33. Petitioner's attacks on Georgia's post-*Bacchus* statute—the constitutionality of which already

[3] Similarly, there is no need to address the question whether a State's retroactivity rule ever may be viewed as a limit on its waiver of sovereign immunity that is defined by state law. The Georgia Supreme Court here expressly applied the retroactivity rule set out in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), see Pet. App. Ex. A, at 2, and it therefore "is eminently clear that the 'state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law.'" *American Trucking Ass'ns, Inc. v. Smith*, 110 S.Ct. 2323, 2330 (1990) (plurality opinion), quoting *Michigan v. Long*, 463 U.S. 1032, 1040 (1983).

has, in any event, been settled (see *Heublein, Inc. v. Georgia*, 351 S.E.2d 190 (Ga.), app. dismissed, 483 U.S. 1013 (1987))—therefore are beside the point.

In fact, the controlling precedent here is *ATA* rather than *McKesson*, and the dispositive question is whether to apply the approach to retroactivity taken by the *ATA* plurality or the *ATA* dissent. The plurality, of course, was of the view that decisions announcing new rules do not "appl[y] to conduct or events that occurred before the date of the decision" (110 S.Ct. at 2330 (plurality opinion)), explaining that retroactivity in such circumstances is governed by "the *Chevron Oil* test." See *id.* at 2331, referring to *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The dissent concluded that the Court must apply its current understanding of the law in every case, but that the relief available under that law may be limited. See *ATA*, 110 S.Ct. at 2347-2348 (Stevens, J., dissenting).

In many cases this disagreement is of only theoretical importance, since a decision to withhold relief will have the same effect on the parties regardless of the underlying rationale. See *ATA*, 110 S.Ct. at 2347-2348 (Stevens, J., dissenting). That is not so here, however, for under *McKesson*, "[o]nce a constitutional decision applies and renders a state tax invalid, due process, not equitable considerations, will generally dictate the scope of relief offered." *Id.* at 2339 (plurality opinion). See *McKesson*, 110 S.Ct. at 2247. Similarly, the disagreement between the *ATA* plurality and dissent is of relatively little practical importance—even in tax cases where *McKesson* applies—when the plurality's test leads to retroactive application of the decision at issue. See *Ashland Oil, Inc. v. Caryl*, 110 S.Ct. 3202, 3204 (1990) (per curiam). Again, however, that is not the case here; as we explain below, *Bacchus* plainly set out a new principle of law within the meaning of the *ATA* plurality opinion. As a consequence, the *ATA* plurality's approach would not require the State to offer a retroactive remedy

here, while the dissent's rule would "obligate[] the State to provide meaningful backward-looking relief." *McKesson*, 110 S.Ct. at 2247. We therefore turn to the controlling question in this case: whether to view retroactivity "as a choice of law rule [or] * * * as a remedial principle." *ATA*, 110 S.Ct. at 2348 (Stevens, J., dissenting).

A. The Court Should Apply The *Chevron Oil* Test In Determining Whether New Principles Of Law Control The Case Before It.

Not surprisingly, we are of the view that the *ATA* plurality's approach better accords both with this Court's precedents and with the general understanding of retroactivity. The issues were addressed at length by the Court in *ATA*, and we will not rehearse the arguments here. In our view, however, several points bear special emphasis.

1. As an initial matter, whether or not the *ATA* dissent's characterization of retroactivity is, strictly speaking, consistent with the Court's prior holdings, that characterization does not appear to accord with the Court's past understanding of its decisions. The Court's civil retroactivity rulings typically contain language indicating that "the decision will not apply" to past conduct, or that "we will apply our decision in this case prospectively." *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969). See also, *e.g.*, *Chevron Oil*, 404 U.S. at 106-107 ("'a holding of nonretroactivity'"); *Phoenix v. Kolodziejski*, 399 U.S. 204, 214 (1970) ("[o]ur decision in this case will apply only to" specified conduct); *Lemon v. Kurtzman*, 411 U.S. 192, 199-200 (1973) (*"Lemon II"*) (plurality opinion) (contrasting retroactivity with remedy). This sort of language—stating that "a decision will not apply" to past conduct— surely is most naturally read as meaning that the *rule* announced in that decision will not apply. Indeed, Justice Harlan wrote separately in *United States v. Estate of Donnelly*, 397 U.S. 286, 295-297 (1970) (Harlan, J., concurring), precisely because

he was concerned that the Court's opinion pointed in the direction taken by the *ATA* plurality. See *id.* at 295. The lower courts, practitioners,[4] and commentators therefore uniformly have understood the Court's retroactivity decisions to be "a doctrine or set of rules for determining when past precedent should be applied to a case before the court." *ATA*, 110 S.Ct. at 2340 (plurality opinion). See *id.* at 2340 & n.2 (citing commentary). There is no compelling reason to depart from this long-settled understanding.

2. This is particularly so because there is no Article III or other constitutional defect in the *ATA* plurality's approach. Perhaps the Court's most oft-quoted statement on the subject is its declaration that " 'the federal constitution has no voice upon the subject' of retrospectivity" (*United States v. Johnson*, 457 U.S. 537, 542 (1982), quoting *Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932)), and the Court has "firmly rejected the idea that all new interpretations of the Constitution must be considered always to have been the law and that prior constructions to the contrary must always be ignored." *Williams v. United States*, 401 U.S. 646, 651 (1971) (plurality opinion). See also, *e.g.*, *Linkletter v. Walker*, 381 U.S. 618, 622 n.3 (1965). There undeniably is, moreover, a real controversy between the parties in a case such as this one. And a holding of nonretroactivity is hardly advisory; the Court's opinion in such a case simply explains its rationale for choosing a

[4] The petitioners in *ATA* and *McKesson*, for example, grounded virtually their entire arguments on the assumption that the *Chevron Oil* test controlled the retroactive applicability of *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), and *Bacchus*, respectively. See *ATA*, No. 88-325, Pet. Br.; *McKesson*, No. 88-192, Pet. Br. They repeated these arguments in their briefs on reargument in *McKesson*. While the *ATA* petitioners briefly suggested that a departure from *Chevron Oil* was possible, they did so by offering a policy-based standard that would require governmental entities always to make full recompense for constitutional violations; they did not advocate the analysis subsequently adopted by the *ATA* dissent. See No. 88-325, Pet. Br. 12-13.

particular rule and applying that rule (or failing to apply it) to particular facts. A ruling of that sort is similar in principle to, and relies upon the same considerations of policy as, a conclusion that a prior holding was wrongly decided but should not be overruled so as to protect the litigants' (and the public's) reliance interests. See, *e.g.*, *Flood v. Kuhn*, 407 U.S. 258, 282-284 (1972).

In fact, as the *ATA* plurality explained, principles of nonretroactivity long have been understood to be an element of the doctrine of *stare decisis*. 110 S.Ct. at 2340-2341, citing *Sunburst*, 287 U.S. at 364 (Cardozo, J.), Certainly, if it is appropriate for the Court to protect the public's expectation interests by declining to overrule a decision that is thought to have been wrongly decided, it is equally proper to allow courts, by means of prospective overruling, "to respect the principle of *stare decisis* even when they are impelled to change the law in light of new understanding." *ATA*, 110 S.Ct. at 2341 (plurality opinion). Justice Scalia offered a related analysis in *ATA*, where he concluded that a Justice who disagrees with a decision that overruled precedent may decline to apply that decision to conduct that had been undertaken in reliance on the precedent; in such circumstances, *stare decisis* principles permit a departure from the more recent decision so as not to "upset * * * settled expectations." *Id.* at 2345 (Scalia, J., concurring in the judgment) (emphasis omitted). We add only that, if Justice Scalia's understanding of *stare decisis* is correct—and we believe it is—it is not at all clear why it should be inconsistent with the judicial role for a judge who *agrees* with a decision to decline to apply that decision's rule so as to protect those same expectation interests.[5]

[5] As in *ATA*, use here of "civil retroactivity principles does not result in the unequal treatment of similarly situated litigants." 110 S.Ct. at 2342 (plurality opinion). As also was true in *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), see *ATA*, 110 S.Ct. at 2337, 2342 (plurality opinion), the Court in *Bacchus* simply held the challenged tax unconstitutional and remanded the

This conclusion draws substantial support from the Court's application of retroactivity in habeas corpus proceedings. Prior to the Court's decision in *Linkletter*, "the criteria applied in federal habeas corpus proceedings were uniformly the constitutional standards in effect at the time of those proceedings, regardless of when the conviction was actually entered." Mishkin, *The Supreme Court 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 78 (1965). See, *e.g.*, *Sanders v. United States*, 373 U.S. 1, 17 (1963). But the Court has since seemingly adopted an approach, first propounded by Justice Harlan in *Mackey v. United States*, 401 U.S. 667, 675 (1971) (opinion of Harlan, J.), that accords most constitutional decisions nonretroactive effect in habeas proceedings. *Teague v. Lane*, 109 S.Ct. 1060, 1075 (1989) (plurality opinion). See *id.* at 1079 (White, J., concurring in part and concurring in the judgment); *ibid.* (Blackmun, J., concurring in part and concurring in the judgment); *id.* at 1079-1080 (Stevens, J., concurring in part and concurring in the judgment).

This approach rests, in part, on the purposes of habeas. See *Teague*, 109 S.Ct. at 1072 (plurality opinion); *Mackey*, 401 U.S. at 682 (opinion of Harlan, J.). But any suggestion that the Court's analysis was compelled by congressional intent plainly would be a fiction. Instead, the Court avowedly has relied on the policies of finality and reliance, concluding that they " 'outweigh * * * the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed.' " *Teague*, 109 S.Ct. at 1072 (plurality opinion), quoting *Mackey*, 401 U.S. at 682-683 (opinion of Harlan, J.). See *Teague*, 109 S.Ct. at 1073-1075; *Shea v. Louisiana*, 470 U.S. 51, 58-60 (1985); *Solem v. Stumes*, 465 U.S. 638, 651-653 (1984) (opinion of Powell, J.). Indeed, these policies have been held to justify the conclusion that "otherwise identically situated defendants may be subject to different constitutional rules." *Shea*, 470 U.S. at 63-64 (White, J., dissenting). See *Griffith v. Kentucky*, 479 U.S. 314, 329-332 (1987) (White, J., dissenting). Again, if such considerations may justify disregard of "current constitutional law" in habeas proceedings (*Mackey*, 401 U.S. at 686 (opinion of Harlan, J.)), there is no reason to find it inconsistent with the judicial function for a judge, looking to similar policies, to decline to apply current law in a case such as this one.

case for a determination whether retroactive relief would be appropriate. See 468 U.S. at 277.

3. In fact, there are compelling considerations that militate against retroactive application of new constitutional principles in cases involving state taxation. The *ATA* plurality properly noted that retroactivity may "have potential disruptive consequences for the State and its citizens. A refund, if required by state or federal law, could deplete the state treasury, thus threatening the State's current operations and future plans." 110 S.Ct. at 2333. Petitioner therefore demonstrates a profound misunderstanding of the fiscal realities facing state and local governments by cavalierly suggesting that Georgia finds it "inconvenient" to pay refunds and "could simply issue 'credit memos' to those with valid refund claims." Br. 42. In a time of almost universal budget deficits, it is hardly a simple matter for a state or local government suddenly to make unexpected outlays (or make up for unexpected revenue shortfalls) of many millions of dollars.[6]

[6] Not surprisingly, petitioner fails to acknowledge that, in cases involving discrimination under the Commerce Clause, *McKesson* gives States the option of retroactively raising the taxes of taxpayers who received unconstitutionally favorable treatment in lieu of paying a refund to the disfavored group. See *McKesson*, 110 S.Ct. at 2252. But this is not a complete answer to concerns about the disruptive consequences of retroactive liability. In many cases retroactive tax increases will be impracticable; in others, refunds will be mandatory because the invalidated tax "was beyond the State's power to impose" or the taxpayers were "absolutely immune from the tax." *Id.* at 2251. And even when practical and permis-

Pointing to just this consideration, Justice Powell, writing for five Justices in *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1106-1107 (1983), explained the untoward consequences of imposing retroactive monetary liability on a State. Noting that "the cost [of retroactive relief in *Norris*] would fall on the State of Arizona," and that "[p]resumably other state and local governments also would be affected directly" by the Court's decision, the Court concluded: "Imposing such unanticipated financial burdens would come at a time when many States and local governments are struggling to meet substantial fiscal deficits. Income, excise, and property taxes are being increased." Because the illegality of Arizona's conduct had not been settled until the decision in *Norris* itself, the Court saw "no justification * * * to impose this magnitude of burden retroactively on the public." *Ibid.* See *id.* at 1110 (O'Connor, J., concurring).

Even beyond the immediate fiscal impact, retroactive application of new rules in such circumstances would subject state officials to extraordinarily awkward and conflicting obligations. State legislators hardly can be expected to repeal tax statutes that are consistent with standing precedents of this Court. And even if those precedents have been called into question by subsequent decisions, the Court has made clear that "the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S.Ct. 1917, 1921-1922 (1989). As a consequence, in a case such as this one

> a state supreme court would have every reason to consider itself bound by [this Court's] precedents to uphold the tax against a constitutional challenge. Similarly, state tax collection authorities would have been justified in relying on state enactments valid under then-current precedents of this Court, particularly where, as here, the enactments were upheld by the State's highest court.

sible, retroactive taxes disrupt the expectations of the taxpayers who are forced to pay them.

ATA, 110 S.Ct. at 2333 (plurality opinion). Indeed, state officials typically are bound under state law to enforce presumptively valid statutes until directed otherwise by the courts. If States may be forced to surrender funds collected pursuant to such statutes, "a government's ability to plan or carry out its programs" will be seriously compromised. *Id.* at 2335.

Other, related considerations reinforce the conclusion that retroactive application of new rules may lead to substantial public harm. In *Lemon II*, the Court rejected a constitutional challenge that

> would have [had] state officials stay their hands until newly enacted state programs are 'ratified' by the federal courts, or risk draconian, retrospective decrees should the legislation fall. In our view, [this] position could seriously undermine the initiative of state legislators and executive officials alike. Until judges say otherwise, state officers * * * have the power to carry forward the directives of the state legislature.

411 U.S. at 207-208 (plurality opinion). In the absence of compelling constitutional considerations mandating retroactivity (see *id.* at 201-203), the plurality added that "[w]e do not engage lightly in post hoc evaluation of such political judgment, founded as it is on 'one of the first principles of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law.'" *Id.* at 208, quoting *San Antonio School District v. Rodriguez*, 411 U.S. 1, 60 (1973). While the Court in *Lemon II* was specifically addressing questions of remedy rather than retroactivity, its underlying premise is equally applicable here: "absent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful." *Lemon II*, 411 U.S. at 208-209 (plurality opinion).

It is worth adding that, when a state or local government is held liable, the ultimate burden falls not on a wrongdoer but on "the shoulders of blameless or unknowing taxpayers" (*City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981)) in the form of higher taxes or reduced benefits—or, given strapped state treasuries, both. When the government has acted in disregard of clearly established law, that outcome may be appropriate. But "because the State cannot be expected to foresee that a decision of this Court would overturn established precedents, the inequity of unsettling actions taken in reliance on those precedents is apparent." *ATA*, 110 S.Ct. at 2333 (plurality opinion).

B. Under The *Chevron Oil* Test, The Decision In *Bacchus* Should Not Be Applied Retroactively.

If the Court follows the approach set out by the *ATA* plurality, it must apply the *Chevron Oil* test to its holding in *Bacchus*. The test's three parts have become familiar:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, * * * we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operation. Finally, we [must] weigh[] the inequity imposed by retroactive operation, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

404 U.S. at 106-107 (citations and internal quotation marks omitted). See *ATA*, 110 S.Ct. at 2331 (plurality opinion). Applying this test, the *ATA* plurality concluded that the Court's decision in *American Trucking*

Ass'ns, Inc. v. Scheiner, 483 U.S. 366 (1987)—which had largely overruled the so-called *Aero Mayflower* line of cases [7]—should not be applied retroactively. See 110 S.Ct. at 2332-2334. Application of the test to *Bacchus* should lead to the same result.

1. *Bacchus* involved a challenge to a Hawaii statute that gave preferential tax treatment to certain locally produced alcoholic beverages. See 468 U.S. at 265-266. The five Justices in the majority concluded that the statute was inconsistent with the Commerce Clause because it discriminated against out-of-state products. *Id.* at 268-273. More important for present purposes, the Court also held that the state law was not saved by the Twenty-first Amendment. The Court did note "broad language in some of the opinions of this Court written shortly after ratification of the Amendment" that precluded application of the Commerce Clause to state liquor regulations. *Id.* at 247; see *id.* at 274 n.13, citing *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936). But citing *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), and *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), the Court concluded that "the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." *Bacchus*, 468 U.S. at 275; see *id.* at 275-276.

The Court therefore held that,

> [d]oubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition. * * * State laws that constitute mere economic protectionism are

[7] *Aero Mayflower Transit Co. v. Georgia Public Service Comm'n*, 295 U.S. 285 (1935); *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, 332 U.S. 495 (1947); *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950).

> therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor. Here, the State does not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment, but instead acknowledges that the purpose was "to promote a local industry."

468 U.S. at 276 (citation omitted). The Court accordingly invalidated the tax because it was inconsistent with the Commerce Clause and was "not supported by any clear concern of the Twenty-first Amendment." *Ibid.*

Justice Stevens, joined by then-Justice Rehnquist and Justice O'Connor,[8] issued a vigorous dissent, suggesting that the constitutionality of the Hawaii law was "squarely" settled by this Court's precedents. 468 U.S. at 282. Noting that the State in *Bacchus* did not contest Congress's authority to regulate liquor (see *id.* at 279), Justice Stevens explained that the Court's early opinions "immediately recognized that [the Amendment's] broad language confers power upon the States to regulate commerce in intoxicating liquors unconfined by ordinary limitations imposed on state regulation of interstate goods by the Commerce Clause and other constitutional provisions." *Id.* at 281 (citing cases). Justice Stevens added that the Court has "consistently reaffirmed that understanding of the Amendment." *Id.* at 282.

Specifically addressing the argument that Hawaii's tax was unconstitutional because it imposed a burden on liquor produced out-of-state, Justice Stevens concluded that, "[a]s I read the text of the [Twenty-first] Amendment, it expressly authorizes this sort of burden. Moreover, as I read Justice Brandeis' opinion for the Court in the seminal case of *State Board of Equalization v. Young's Market Co.*, * * * the Court has squarely so decided." 468 U.S. at 282. Justice Stevens also noted that

[8] Justice Brennan did not participate in the consideration or decision of the case. 468 U.S. at 277.

the decision in *Idlewild*, which the Court suggested had qualified the reasoning of *Young's Market*, "merely rejected the broad proposition that the Twenty-first Amendment had entirely divested Congress of all regulatory power over interstate or foreign commerce in intoxicating liquors." *Id.* at 284. Justice Stevens added that the Court's conclusion—that state laws are not protected by the Amendment when they are unrelated to temperance or the perceived evils of traffic in liquor—involves "a totally novel approach to the Twenty-first Amendment." *Id.* at 286-287.

2. In our view, the same factors that the *ATA* plurality found decisive are at work in this case. Indeed, so far as is relevant here, *Bacchus* and *Scheiner* are remarkably similar. In both, the Court noted longstanding precedents that supported the constitutionality of the challenged state tax. See *Scheiner*, 483 U.S. at 293-295; *Bacchus*, 468 U.S. at 274-275 & n.13. In both, the Court pointed to more recent decisions that, it suggested, had called into question the vitality of those precedents. See *Scheiner*, 483 U.S. at 295; *Bacchus*, 468 U.S. at 274-276. In both, the Court's decision left very little (or nothing) of those precedents standing.[9] See generally *ATA*, 110 S.Ct. at 2331 (plurality opinion). And in both, three dissenting Justices argued that the Court's holding was a marked and unwarranted departure from its precedents. See *Scheiner*, 483 U.S. at 298-303 (O'Connor, J., dissenting); *Bacchus*, 468 U.S. at 282-283 (Stevens, J., dissenting). That is enough to dispose of this case: if three Justices of this Court are of the view that a decision is inconsistent with "square[]" contrary holdings (*Bacchus*, 468 U.S. at 282 (Stevens, J., dissenting)) and rests on "a totally novel approach" (*id.* at 286), state

[9] In both, the Court also made rather unenthusiastic attempts to distinguish those precedents. See *Scheiner*, 483 U.S. at 296 & n.26 (noting practical impossibility of precise apportionment in *Aero Mayflower* cases); *Bacchus*, 468 U.S. at 274 n.13 (noting *Young's Market*'s observation that a high import fee may aid in policing liquor traffic).

legislators and taxing officials hardly can be faulted for failing to anticipate that decision.

3. In any event, a review of this Court's holdings makes clear that *Bacchus* did set out a new principle of law. The Court's earliest opinions in cases involving the Twenty-first Amendment flatly held that Commerce Clause restrictions do not apply to state taxation or regulation of liquor. Thus in *Young's Market*—decided, coincidentally, one year after the first of the *Aero Mayflower* line of cases—the Court upheld a fee on liquor imported from other States, explaining that the taxing State's motivation in enacting the fee was irrelevant. 299 U.S. at 63. See *Bacchus*, 468 U.S. at 282-283 (Stevens, J., dissenting).

Subsequent decisions repeatedly and expressly rejected the contention that state laws motivated by economic protectionism are not saved by the Amendment. In *Finch & Co. v. McKittrick*, 305 U.S. 395, 397-398 (1939) (Brandeis, J.), for example, a Commerce Clause challenge to the retaliatory exclusion of out-of-state liquor was grounded on the contention that "the [state] law does not relate to protection of the health, safety and morality, or the protection of their social welfare, but is merely an economic weapon of retaliation; and that, hence, the Twenty-first Amendment should not be interpreted as granting power to enact it." The Court gave the argument short shrift: "[s]ince that amendment, the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause." *Ibid.* See also, *e.g.*, *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939) (Brandeis, J.) ("[s]ince the Twenty-first Amendment, as made clear in the *Young* case, the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause"). These statements were hardly dicta, as petitioner repeatedly asserts (Br. 26, 29); they were essential to the resolution of the only issues presented.

Petitioner suggests (Br. 26, 28-29) that this understanding was disturbed by the decision in *Idlewild*, pointing to the Court's statement that to "draw a conclusion from [the early decisions] that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause whenever regulation of intoxicating liquors is concerned would * * * be an absurd oversimplification." 377 U.S. at 331-332. The Court made this statement, however, in support of its observation that the Amendment did not divest *Congress* of its power to regulate liquor; the Court immediately added that, "[i]f the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and demonstrably incorrect." *Id.* at 332.

The Court accordingly held that a State's attempt to interfere with federally approved shipments of liquor overseas were not supported by the Amendment. 377 U.S. at 333-334.[10] At the same time, however, the Court, citing *Young's Market*, made clear that "by virtue of [the Amendment's] provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Id.* at 330. The Court added that "[t]his view of the scope of the Twenty-first Amendment with respect to a State's power to restrict, regulate, or prevent the traffic and distribution of intoxicants within its borders has remained unquestioned." *Ibid.*[11]

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[10] The Court's holding in *Idlewild* actually turned on a principle that predated—and that was entirely consistent with—its rulings in *McKittrick* and *Indianapolis Brewing*: that a State may not prohibit the transportation through its territory of liquor that is destined for consumption elsewhere. See 377 U.S. at 332, citing *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938).

[11] Indeed, in *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964), a decision issued the same day

In subsequent decisions the Court reaffirmed congressional authority to regulate liquor,[12] and suggested that, "[o]*nce passing beyond consideration of the Commerce Clause*, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful." *Craig v. Boren*, 429 U.S. 190, 206 (1976) (emphasis added).[13] But the Court consistently continued to hold that the "importation of intoxicants [is] a regulatory area where the State's authority under the Twenty-first Amendment is transparently clear." *Id.* at 206-207. It therefore several times affirmed *Idlewild*'s observation that "a State is totally unconfined by traditional Commerce Clause limitations" when restricting the importation of liquor for use within its borders. See *California v. LaRue*, 409 U.S. 109, 114 (1972); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 42 (1966). And the Court repeatedly cited cases like *Young's Market*[14] and *McKittrick*[15] with apparent ap-

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as *Idlewild*, the Court quoted *Idlewild*'s observation that States are "totally unconfined by traditional Commerce Clause limitations" in restricting the importation of intoxicants for use or distribution within their borders. 377 U.S. at 344. See *id.* at 344 n.4 (citing *Young's Market*). The Court held in *Beam* that a state tax on foreign liquor transactions was inconsistent with the Export-Import Clause, and was not saved by the Twenty-first Amendment, precisely because "what is involved in the present case * * * is not the generalized authority given to Congress by the Commerce Clause, but a constitutional provision which flatly prohibits any State from imposing a tax upon imports from abroad." *Ibid.*

[12] See *Crisp*; *Midcal*. See also *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 282 n.9 (1972).

[13] See *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). Cf. *California v. LaRue*, 409 U.S. 109, 116 (1972).

[14] See *Midcal*, 445 U.S. at 107; *Craig*, 429 U.S. at 206-207; *LaRue*, 409 U.S. at 114; *Seagram*, 384 U.S. at 42; *Beam*, 377 U.S. at 344; *Idlewild*, 377 U.S. at 330.

[15] See *Midcal*, 445 U.S. at 108; *Craig*, 429 U.S. at 206; *Beam*, 377 U.S. at 344 n.4; *Idlewild*, 377 U.S. at 330.

proval. Indeed, it did so just eleven days prior to the decision in *Bacchus*, stating that

> "This Court's decisions . . . have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause." *Craig*, [429 U.S. at 206]. Thus, as the Court explained in [*Idlewild*], § 2 [of the Amendment] reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause.

Crisp, 467 U.S. at 712-713, citing *Idlewild*, 377 U.S. at 330, and *Young's Market*, 299 U.S. at 62-63.

Against this background, Georgia plainly was entitled to rely on this Court's pre-*Bacchus* Twenty-first Amendment decisions. Prior to *Bacchus* the Court never had suggested that holdings such as *Young's Market* and *McKittrick* no longer were good law insofar as they authorized state taxation or regulation of liquor intended for domestic use. And the Court never had so much as hinted that protectionist state statutes were outside the scope of the Amendment. Even if the outcome in *Bacchus* had been implicitly foreshadowed by language in some of the Court's earlier decisions—and in our view it had not been—that would not distinguish *Bacchus* from *Scheiner*; the holding in the latter case arguably had been suggested by decisions such as *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). See *Scheiner*, 483 U.S. at 294-295. Indeed, in one significant respect the State's expectation of continuity in the law was considerably stronger here than in *ATA*: taxes such as the one at issue here seemingly were, as Justice Stevens noted in *Bacchus*, "expressly authorize[d]" by the text of the Twenty-first Amendment. 468 U.S. at 282. Cf. *North Dakota v. United States*, 110 S.Ct. 1986, 2001 (1990) (Scalia, J., concurring in the judgment).

Here, the Georgia tax long ago had been challenged and upheld by the Georgia Supreme Court. *Scott v.*

Georgia, 2 S.E.2d 65 (Ga. 1939), overruled on other grounds, *Blackston v. Georgia Dep't of Natural Resources*, 334 S.E.2d 679 (Ga. 1985). That decision expressly relied on holdings of this Court. See *Scott*, 2 S.E.2d at 66, citing *Young's Market* and *Indianapolis Brewing Co.* Those holdings never had been called into question and repeatedly had been cited with approval by this Court. See *ATA*, 110 S.Ct. at 2332 (plurality opinion); compare *Ashland Oil*, 110 S.Ct. at 3205 (retroactivity in order where decision "did not overrule clear past precedent nor decide a wholly new issue of first impression"). In fact, petitioner's assertion (Pet. Br. 33) that the limited scope of the Twenty-first Amendment had long been clear is belied by its own notable failure to challenge Georgia's tax until after the decision in *Bacchus*.[16] *Bacchus* accordingly established a new principle of law within the meaning of the first prong of the *Chevron Oil* test. See *ATA*, 110 S.Ct. at 2332 (plurality opinion).

4. The results of the second element of the *Chevron Oil* test are equally clear. As we have just noted, when enacted and enforced Georgia's tax was consistent with this Court's Twenty-first Amendment doctrine; in such a case, as the *ATA* plurality explained, "it is not the purpose of the Commerce Clause to prevent legitimate state taxation of interstate commerce." 110 S.Ct. at 2332. Indeed, the adequacy of prospective relief is particularly apparent in the Commerce Clause setting, because that provision was designed to protect the interstate market rather than individual participants in the market. See, *e.g.*, *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 881 (1985); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 475 (1981). We argue this issue at length

[16] Petitioner's failure to challenge the tax was not a consequence of its inability to discover the protectionist purposes of the state statute; as the trial court explained, those purposes were announced in the legislative history. Pet. App. Ex. C, at 8-9.

in our brief in *Dennis v. Higgins*, No. 89-1555, now pending before the Court, and do not repeat our discussion of the issue here.[17]

Petitioner's principal response on this point is its assertion that retroactive application of *Bacchus* is necessary as a deterrent to improper state conduct, a contention grounded on the argument that Georgia's post-*Bacchus* statute remains unconstitutional. Br. 38-39. If petitioner were correct in its assessment of that statute, a successful challenge to the *new* tax might well require a retroactive remedy. As we note above, however, petitioner's challenge to the post-*Bacchus* statute was *rejected* by the state courts, and this Court denied review. In any event, the constitutionality of the new tax is beside the point here; it remains true that constitutional values are not advanced by punishing States for actions that, at the time they were taken, were entirely consistent with this Court's dicates.

For reasons that we explain above, the equities also cut powerfully against retroactive application of *Bacchus*. As in *ATA*, "here the State promulgated and implemented its tax scheme in reliance on * * * precedents of this Court." 110 S.Ct. at 2333 (plurality opinion). In such circumstances, "the inequity of unsettling actions taken in reliance on those precedents is apparent." *Ibid.* Petitioner's argument to the contrary (Br. 41-42) turns largely on the wholly insupportable assertion that paying refunds would not be burdensome to the State. The *ATA* plurality rejected an identical contention, and that should dispose of this case. See 110 S.Ct. at 2333-2335.

[17] Copies of our brief in *Dennis* have been served on the parties along with this brief.

CONCLUSION

The judgment of the Georgia Supreme Court should be affirmed.

Respectfully submitted,

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August 29, 1990

No. 89-686

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

JAMES B. BEAM DISTILLING CO.,
Petitioner,

VS.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE I. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,
Respondents.

On Writ of Certiorari to the Supreme Court of Georgia

AMICUS CURIAE BRIEF OF THE STATES OF CALIFORNIA, WISCONSIN, NEW MEXICO, OHIO, MICHIGAN, NEBRASKA, HAWAII, WEST VIRGINIA, WASHINGTON, SOUTH DAKOTA, UTAH, CONNECTICUT, FLORIDA, IDAHO, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The State of California, on behalf of the California Franchise Tax Board, submits this brief, pursuant to Rule 37, as amicus curiae in support of respondent State of Georgia.[1] The following States join California in this brief: Wisconsin, New Mexico, Ohio, Michigan, Nebraska, Hawaii, Washington, South Dakota, Utah,

[1] Pursuant to Rule 37.5, California is not required to obtain the consent of the parties to file this brief.

Connecticut, Florida, Idaho, West Virginia and the District of Columbia.

While California recognizes the importance of this case to Georgia, the concern of amicus curiae reaches far beyond the resolution of *Beam*. This case presents the Court with the opportunity to speak directly to the larger issue of under what circumstances must a state be required to refund taxes[2] collected under a state statute that is subsequently determined by the Court to be unconstitutional under the Commerce Clause. This question recently has been addressed in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 495 U.S. ____, 110 L.Ed.2d 17 (1990); *American Trucking Assns. v. Smith*, 495 U.S. ____, 110 L.Ed.2d 148 (1990); and *Ashland Oil, Inc. v. Caryl*, 497 U.S. ____, 111 L.Ed.2d 734 (1990). However, resolution of the retrospective/prospective issue as it is presented in this case will require the Court to articulate in greater detail than in these previous decisions precisely when the first prong of the test in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) is satisfied. Specifically, amicus urges this Court to address an issue of great importance to the states' ability to administer their tax and revenue laws. That issue is whether the first prong of *Chevron* is satisfied where a state has reasonably relied upon a decision of its appellate court upholding a statute later determined, after a decision of this Court, to be violative of the Commerce Clause.

SUMMARY OF ARGUMENT

In *Chevron Oil Co. v. Huson*, this Court established a three-pronged test governing consideration of whether to impose a civil decision prospectively or retroactively. The plurality decision in the recent *American Trucking Assns. v. Smith*, *supra* 495 U.S. ____, 110 L.Ed.2d 148 case applied the *Chevron* test to the determination of retroactivity in cases declaring state taxes unconstitutional.

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[2] Or otherwise provide a remedy consistent with *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 495 U.S. ____, 110 L.Ed 2d 17 (1990)

The first prong of *Chevron*, whether the decision to be applied nonretroactively establishes a new principle of law, either by overturning clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, may be satisfied where a state has relied upon a decision of its own appellate court, and should not be limited only to situations where the United States Supreme Court has decided the issue.

ARGUMENT

THE FIRST PRONG OF *CHEVRON* SHOULD BE LIBERALLY INTERPRETED IN FAVOR OF A FINDING OF A NEW PRINCIPLE OF LAW

This Court's recent decision in *American Trucking Assns. v. Smith, supra*, at 495 U.S. ____, 110 L.Ed.2d 148, directly confronted the issue of whether a decision declaring a tax unconstitutional under the Commerce Clause must apply retroactively or may apply prospectively. Under the reasoning of the four-member dissent, constitutional decisions apply retroactively to all cases on direct review. *American Trucking Assns., supra*, at p. ____, 110 L.Ed.2d 148, 177-178 (Stevens, J., dissenting). Under the approach of the plurality, the *Chevron* test is to be applied. *Supra*, at 110 L.Ed.2d 148, 160-163.

It is well settled that the Constitution neither prohibits nor requires retroactive effect. *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932). In *Chevron Oil, supra*, 404 U.S. 97, this Court set forth three general factors to be considered when dealing with the nonretroactivity question outside the criminal area:

> "*First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed.* Second, it has been stressed that we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further

or retard its operation. Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity." 404 U.S. at 106-107 (citations and internal quotations omitted, emphasis added).

Chevron did not directly address the question of when retroactive effect should be given to a ruling of unconstitutionality, for the case held only that a decision specifying the applicable state statute of limitations in another context should not be applied retroactively because, among other reasons, the decision overruled clear Circuit precedent on which the complaining party had been entitled to rely. However, the applicability of *Chevron* in the broader context of *all* civil cases was resolved in later decisions of the Court.

In *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), it was announced that a "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." The *Griffith* opinion stated in no uncertain terms that the area of civil retroactivity "*continues* to be governed by the standard announced in *Chevron Oil Co. v. Huson.*" 479 U.S. at 322, n. 8 (emphasis added). *Griffith* relied heavily upon *United States v. Johnson*, 457 U.S. 537 (1982), in formulating this new standard of retroactivity in criminal cases. The *Johnson* opinion also affirmed the continued vitality of the *Chevron* standard for civil cases by pointing out that "*all questions of civil retroactivity* continue to be governed by the standard enunciated in *Chevron Oil Co. v. Huson.*" 457 U.S. at 563 (emphasis added).

The plurality in *American Trucking Assns.* recognizes *Griffith* and *Johnson* as standing for the proposition that retroactivity in cases declaring state taxes unconstitutional is to be determined under *Chevron*. Such recognition is correct, notwithstanding the claim of the dissent that the plurality's conclusion is "supported by nothing more than a misreading . . ." of *Chevron*. *Supra*, at 110 L.Ed.2d 148, 178 (Stevens, J., dissenting).

The first prong of *Chevron* looks to whether the decision to be applied nonretroactively "must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." 404 U.S., at 106. The plurality in *American Trucking Assns.* found this first test of nonretroactivity satisfied in analyzing *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266 (1987) because both the majority and dissent in *Scheiner* "left very little of the *Aero Mayflower [Aero Mayflower Transit Co. v. Board of Railroad Comm'rs of Montana*, 332 U.S. 495 (1947) and *Aero Mayflower Transit Co. v. Georgia Public Service Comm'n*, 295 U.S. 285 (1935)] line of precedents standing." *Supra*, at 110 L.Ed.2d 148, 160. More recently, in *Ashland Oil, Inc. v. Caryl*, 497 U.S. ____, 111 L.Ed.2d 734 (1990), this Court stated its decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) was "not revolutionary", and did not meet the first prong of the *Chevron* test because it "did not overrule clear past precedent nor decide a wholly new issue of first impression. . . ." *Supra*, at 497 U.S. ____.

Amicus California respectfully urges the Court to exercise restraint in interpreting the first prong of the *Chevron* test in what appears to be an increasingly narrower manner leading to few or no situations where a decision would apply prospectively only. The direction of this Court suggests that ultimately, perhaps the only situation in which that prong would be satisfied is where one United States Supreme Court decision is expressly overruled in a majority opinion of a later United States Supreme Court decision. Such an interpretation is not supportable under *Chevron* and would work a great hardship on the states.

Contrary to the language in *Ashland*, the first prong of the *Chevron* test does not, and should not, require the new decision to be "revolutionary" or to decide a "wholly" new issue of first impression, in order for a decision to be applied prospectively. *Chevron* set forth a far broader, and more appropriate, standard for the first prong than what is suggested in *Ashland Oil* and *American Trucking Assns.* The case at bench provides this Court with the opportunity to elucidate upon the proper test.

The first prong of *Chevron* is satisfied if the decision overrules "clear past precedent on which litigants may have relied" 404 U.S. at 106. Amicus submits that litigants should be entitled to reasonably rely upon "precedent" *other than* United States Supreme Court decisions, and that good faith reliance by a state upon a decision of its appellate court or, indeed, on a longstanding state statute that has never been questioned in court, should satisfy the first prong of *Chevron*. See *Butler v. McKellar*, 494 U.S. ____, 108 L.Ed.2d 347, 354-357 (1990). A ruling that a state may not rely on taxes collected unless and until the validity of each tax statute has been fully tested in the highest court in the nation would impose an unreasonable burden on a state's power to govern.

In the instant case, the statute in question was challenged in 1939 in Georgia state court on the grounds that it violated the Commerce Clause of the United States Constitution. The statute was upheld in *Scott v. State*, 187 Ga. 702, 2 S.E. 2d 65 (1939), overruled on other grounds, *Blackston v. Georgia Department of National Resources*, 255 Ga. 15, 334 S.E.2d 679 (1985). After the *Scott* decision, the tax was not challenged again until 1985. In that case, the constitutionality of the 1985 amendment to the statute, enacted by Georgia in response to *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984), was upheld by the Georgia Supreme Court in *Heublein, Inc. v. Georgia*, 256 Ga. 578, 351 S.E.2d 190 (1987), appeal dismissed, 483 U.S. 1013 (1987). The Georgia Supreme Court concluded in its decision in *Beam* that during the time the taxes at issue here were collected, Georgia had no reason to believe that the import taxes were unconstitutional. Moreover, when it became clear there might be constitutional problems with the statute, the legislature moved promptly to amend the statute to rectify the defects. See *James B. Beam Distilling Co. v. State of Georgia*, 259 Ga. 363, 383 S.E.2d 95 (1989).

Georgia was entitled under these circumstances to rely upon its *Scott* decision as "clear past precedent" within the meaning of the first prong of the *Chevron* test. Query: What is a state to do when its appellate court upholds the constitutionality of a tax statute enacted by its legislature, and the state court decision then goes unchallenged or, indeed, a state statute generates no court challenge at all? Given the alternatives, it is certainly more reasonable for that state to rely upon the decision of its court than to be forced to "second guess" the wisdom of that decision and not enforce the statute because of the mere possibility that the statute might fail to withstand another constitutional attack at some future time. Amicus submits that where a state chooses the former alternative over the latter, the first prong of *Chevron* is satisfied.[3]

The fact *Scott* constituted precedent which could reasonably be relied upon by Georgia is also demonstrated by petitioner's own actions. Although the Georgia statutory scheme has been in place for decades, this action is based only upon petitioner's claim for refund of taxes assessed and collected from petitioner during 1982 through 1984. This Court decided *Bacchus Imports* on June 29, 1984. *Supra*, 468 U.S. 263. The administrative claim for refund which constitutes the basis of this action was filed by petitioner on or about April 25, 1985. (Appendix to Petition for Writ of Certiorari, Ex. C, para. 14.) Surely there can be no greater evidence of the reasonableness of the State of Georgia's reliance for over forty years upon *Scott* that the statute was constitutional than the fact the petitioner bringing the action itself *did not even challenge the statute until nearly one year after Bacchus* was decided. Petitioner's course of conduct is consistent with the conclusion of the Georgia Supreme Court in this case that Georgia had no reason to believe, after *Scott* but before *Bacchus*, that the statute in issue was unconstitutional.

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[3] The former alternative may be the *only* alternative for some states. In California, for example, the law is clear that under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Accordingly, decisions of the California Supreme Court are binding upon and must be followed by all state courts of California. *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 455, 369 P.2d 937 (1962). In addition, under article III, section 3.5 of the California Constitution, an administrative agency such as amicus California Franchise Tax Board "has no power" to declare a statute unenforceable, or to refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that the statute is unconstitutional.

The argument of amicus that litigants may reasonably "rely" upon something less than a United States Supreme Court decision, such as a state appellate court decision, and still satisfy the first prong of *Chevron* is consistent with the alternative language in *Chevron* that a new principle of law is established where an issue of first impression is decided whose resolution "was not clearly foreshadowed." *Chevron*, 404 U.S. at 106. The fact a statute, or an appellate court decision upholding the constitutionality of a tax statute, remains unchallenged for a significant period of time would be inconsistent with a subsequent finding under *Chevron* that the unconstitutionality of the statute or the overturning of that state court decision was somehow "clearly foreshadowed."

Furthermore, while the third prong of the *Chevron* test specifically looks to "the equity imposed by retroactive application", 404 U.S. at 107, this does not mean that the equities of the situation should be ignored in determining under the first prong whether the parties "may" have relied upon the past precedent being overruled. Statutory rules of law "are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity." *Lemon v. Kurtzman*, 411 U.S. 192, 199 (1973) (*Lemon II*). A consequence of this "fact of legal life" is that a state has no choice but to rely upon its statutes[4] and appellate court decisions in making decisions affecting revenue and fiscal interests. Taxes "are the life-blood" of government. *Bull v. United States*, 295 U.S. 247, 259 (1935); *Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512, 523 (1984).

In sum, the first prong of *Chevron* should be read to militate against retroactive application, and in favor of prospective application, where a decision of this Court disapproves a statute previously declared constitutional by a state appellate court decision which has been reasonably relied upon by the state in

[4] As this Court has made clear, in taxation, even more than in other fields, legislatures possess the greatest freedom of classification. *Austin v. New Hampshire*, 420 U.S. 656, 661-662 (1975).

administering its tax system. This interpretation of *Chevron* is consistent with prior opinions of this Court that prospective application is proper where the decision in issue disapproves a practice this Court has arguably sanctioned in prior cases, or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved. *United States v. Johnson*, *supra*, 457 U.S. at 551; *Solem v. Stumes*, 465 U.S. 638, 646 (1984); see e.g., *Gosa v. Mayden*, 413 U.S. 665, 673 (plurality opinion) (applying nonretroactively a decision that "effected a decisional change in attitude that had prevailed for many decades"). A state's reliance upon longstanding "precedent" of a state appellate court, or on an unchallenged statute, or perhaps in appropriate circumstances the decision of a quasi-judicial adjudicative administrative body as well, upholding the constitutionality of a state tax statute, should be given great deference under the first prong of *Chevron*.

CONCLUSION

For the reasons stated, this Court should reaffirm the validity of *Chevron;* elaborate upon the proper application of the first prong of *Chevron;* and affirm the judgment of the Georgia Supreme Court.

Dated: August 29, 1990

Respectfully submitted,

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No. 89-680

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Petitioner,

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Respondents.

On Writ of Certiorari to the Supreme Court of Georgia

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INTEREST OF AMICI CURIAE

This brief in support of Georgia is submitted on behalf of Alabama, Arizona, Arkansas, Colorado, Indiana, Iowa, Louisiana, Maine, Maryland, Minnesota, New Jersey, New York, Utah, Vermont, Virginia and Wisconsin pursuant to Supreme Court Rule 37.

In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the Court held that Hawaii's tax treatment of alcoholic beverages violated the Commerce Clause of the United States Constitution. In response to *Bacchus*, the Georgia legislature amended its tax statute to conform to the ruling in *Bacchus*. That amended legislation has been upheld as constitutional. *Heublein, Inc. v. State*, 256 Ga. 578, 351, S.E.2d 190, *appeal dismissed*, 107 S.Ct. 3253 (1987). The Petitioner in this case seeks the refund of taxes voluntarily paid under the prior statute in effect at the time the Supreme Court decided *Bacchus*.

Amici States and other States are not infrequently faced with litigation which challenges state taxes on Commerce Clause and other constitutional grounds. A single United States Supreme Court decision declaring a state tax unconstitutional, if applied retroactively to taxes collected in other States, could impose an unanticipated liability on such States totaling billions of dollars. *See* W. Hellerstein, *Preliminary Reflections on McKesson and America Trucking Associations*, 48 Tax Notes No. 3, 325, 336 (July 16, 1990). Indeed, the effect of this Court's recent decision in *Davis v. Michigan Department of Treasury*, 109 S.Ct. 1500 (1989), relating to the taxation of federal, state and local retirement benefits, was not only to question the validity of the income tax structure in at least twenty-three States

but also to raise the issue of under what circumstances these States must refund taxes previously paid in an amount now exceeding $2.2 billion. While *Davis* was decided under the intergovernmental tax immunity doctrine rather than the Commerce Clause, there is a potential that these twenty-three States could be substantially affected by the Court's decision in this case.

For the above reasons, Amici States have a direct and abiding interest in the refund issue now before this Court.

SUMMARY OF ARGUMENT

This case concerns a class of tax cases where (a) the state statute in question has been in force for a long time (here more than forty years) and has been unchallenged throughout that period (here specifically upheld against constitutional attack the year after its passage); (b) state taxing authorities and fiscal planners, relying on their reasonable understanding of existing law and long tradition, budgeted, collected and/or spent tax moneys imposed under this statute; (c) this Court, in a recent decision, holds an analogous statute in another State unconstitutional; and (d) taxpayers file suits for refunds involving, in the aggregate, billions of dollars, claiming a right to reimbursement of taxes imposed at a time when both the taxpayer and the State reasonably believed the tax to be lawful. It is the position of the Amici in this Brief that in circumstances such as these this Court should measure the remedial obligations of the States by

a standard that takes account of the financial stability and reasonable reliance interests of state government.

There are two quite independent ways in which such a standard can be implemented. One is to follow the plurality approach in *American Trucking Associations, Inc. v. Smith*, 110 S.Ct. 2323 (1990) (*ATA*), and hold that new and unforeseeable decisions declaring state taxes unconstitutional ought not to be retroactively applied to closed transactions. The other is to read the remedial obligations of *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 110 S.Ct. 2238 (1990), to permit as a matter of procedural due process, the consideration of reasonable state reliance interests and the necessity of sound fiscal planning as among the legitimate factors determining the availability of retrospective relief. In either event, it is submitted, States should not be required to divert current funds from the state treasury to compensate taxpayers for taxable transactions that occurred during a period when a holding of unconstitutionality by the court could not reasonably have been predicted based on the then-current law and settled understandings.

ARGUMENT

I. The Standards Governing State Refund Liability for Taxes Held Unconstitutional Should Take into Account the Financial Stability and Justifiable Reliance Interests of State Governments

At the outset it should be noted that, contrary to the frequent assertions of Petitioner in its Brief, this Court's decision last Term in *McKesson* is of only marginal relevance to the issues now before the Court in the present

case. *McKesson* concerned the remedial obligations imposed on state government in cases where it was entirely foreseeable at the time of enactment of the state tax statute that the tax in question would be contested and invalidated.

Here, by contrast, the issue is closer to the question presented in *ATA*, the companion case to *McKesson*. This Court held in *Bacchus* that a Hawaii state statute on alcoholic beverages was unconstitutional. In the decision below in this case, the Georgia Supreme Court held an analogous Georgia tax unconstitutional but also held that, since the tax had been imposed *before* the decision in *Bacchus*, the taxpayer was not entitled to a refund. The ground of decision in the Georgia Supreme Court was precisely the ground on which the *ATA* decision turned: application of a three-factor test to decide whether a constitutional decision is to be retroactively applied to taxes imposed *before* the decision was made.

The question here, therefore, concerns the standards by which constitutional decisions are to be applied to taxable events that are concluded before the constitutional decision is made. There is a second dimension of the question as well. In *ATA*, a tax statute enacted in 1983 was challenged in 1983; the taxpayer took the first available opportunity to challenge the tax in question.[1] In

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[1] *See also Ward v. Board of County Comm'rs*, 253 U.S. 17 (1920) (tax assessments of Indian lands nontaxable by Congressional Act invalidated and refunds granted; suits were brought immediately upon the locality's adopting the practice of assessing such lands); *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280 (1912) (franchise tax on railroad company invalidated and refunds granted where tax imposed on conduct wholly outside the taxing State; the tax statute enacted in 1907 was challenged almost immediately).

McKesson also it was entirely foreseeable to the taxing and state fiscal planning authorities at the time of collection, indeed at the time of enactment of the statute, that a dispute would arise over the legality of the tax at issue. Here, by contrast, the taxes at issue were paid without complaint for the years in question (1982, 1983, 1984) and, by this taxpayer and others, for more than forty previous years. The taxpayer's complaint, in the form of a suit for a refund, was not filed until *after* this Court declared an analogous tax in another State unconstitutional.

It is unquestionably a major function of this Court to ensure that its decisions are adhered to by state courts and legislatures. There are also important values to be served, however, in accommodations by the Court that take into account the fiscal stability of state government. Here, for example, Georgia has collected a tax under a tax system enacted in 1938. The law was upheld against constitutional attack within a year by the Georgia Supreme Court. It is not a realistic option, as California points out in its Amicus Brief, that tax collection authorities will always accurately guess how existing state tax legislation will fare under subtly evolving constitutional standards, nor is it realistic to expect that state legislators and fiscal planners will anticipate the possible unconstitutionality of every unchallenged tax statute that has been on the books for many years. It is not surprising, therefore, that no one in Georgia government questioned the validity of the taxes paid by this Petitioner, nor is it surprising, indeed, that the Petitioner itself did not question the taxes when paid. No one had done so in over forty years. And it is entirely reasonable for Georgia to

have expended the moneys collected under this tax statute in 1982 and 1983 and 1984 in the normal operation of legitimate state governmental functions.

Now, however, Petitioner asks that Georgia be forced to carve out of current revenues a sum that will compensate it for taxes paid at a time when both parties – Petitioner and the State – assumed they were valid. From the perspective of state government, there should be no mistake about the stakes involved in upsetting such expectations and about the practical impact of unforeseeable monetary liability imposed directly on state treasuries. The potential monetary effect of this Court's recent decision in *Davis v. Michigan Department of Treasury, supra,* provides an example. In an attempt to measure the scope of the potential impact, the Virginia Office of the Attorney General conducted a telephone survey in September of 1989 of twenty-three States with statutes similar to the statute struck down in *Davis*. The States involved provided the following estimates of the potential fiscal impact of *Davis*, as of September 1989:

State	Potential Refund Liability Under State Statute of Limitations Period
Alabama	$10.2 million
Arizona	$261 million
Arkansas	$28 million
Colorado	$22.2 million
Georgia	$200 to $250 million
Iowa	$30 to $50 million
Kansas	$50 million
Kentucky	$50 million
Louisiana	$21 million
Michigan	$25 million
Mississippi	$30 to $35 million
Missouri	$152 million
Montana	$15 million
New Mexico	$25 million
New York	$35 million
North Carolina	$140 million
Oklahoma	$87 million
Oregon	$150 to $190 million
South Carolina	$200 million
Utah	$80 to $100 million
Virginia	$370.4 million
West Virginia	$27 million
Wisconsin	$103 million
TOTAL:	$2.1 to $2.25 billion

Raising taxes, as a theoretical matter, is an alternative answer to a revenue shortfall caused by an unanticipated constitutional tax decision by this Court. But the choice between raising taxes and cutting services is not subject to judicial control and, in today's economic and political climate, is very likely to be made in favor of cutting services. Either way, cases such as the one now before this Court will have a major fiscal effect in the States. This

Court, in effect, will become a major factor in the allocation of limited state resources. Taxes imposed (without objection) and revenues budgeted or spent (in good faith and without any reasonable expectation that they would have to be returned) may now have to be diverted from current state budgets. In this context, this Court's decisions will effect transfers of public funds, running into the billions of dollars. And the practical results of such redistributions will be felt primarily by the taxpayers and citizens who are the beneficiaries of state services. The impact on local government and on citizens dependent on critical state-supported services such as the public schools and higher education, housing, health and public safety, will be real and substantial.

Against this background, we submit, it is appropriate for this Court to measure the retroactivity of its state tax decisions by a standard that gives due recognition to the reasonable behavior of state government. And it is entirely reasonable in this context for a State to rely on systems of taxation that have been in place without challenge for as long as thirty or forty years. It is, of course, a major responsibility of this Court to assure that its interpretations of federal law are respected by state government, and to ensure that adequate remedies are available for the enforcement of the rights that find their source in federal law. But it is not necessary in the discharge of that function for massive financial liability to be imposed directly on state treasuries in a context where no reasonable notice of the possibility of such liability can fairly be said to exist. Nor is it unfair to withhold refund remedies from individual taxpayers in context such as these, where taxes have been imposed under a statute unchallenged

for years and where objections have been raised only in response to opportunities created by recent decisions of this Court.

Appropriate reliance interests and the settled expectations of state government can be protected by application of the equitable principles underlying *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Under this approach, it is important, however, for the standard of retroactivity to take into account reasonable reliance on settled understandings by state government. In another context, this Court has found it reasonable for state judges to rely on "reasonable, good-faith interpretations of existing precedents . . . even though they are shown to be contrary to later decisions." *Butler v. McKellar*, 110 S.Ct. 1212, 1217 (1990). We think it equally reasonable for state legislatures and fiscal planning authorities to rely on settled understandings of permissible tax structures "even though they are shown to be contrary to later decisions." And we also think it is reasonable that the cost of a good-faith mistake should not be massive financial liability imposed directly on the state treasury.

There are, of course, at least two quite different ways in which the legitimate reliance interests of state governments can be recognized. One, illustrated by the plurality approach in *ATA*, is to determine when decisions of this Court are to be applied retroactively – to decide as a matter of federal law that there is no state obligation to provide refunds or other retrospective remedial relief in cases where unforeseeable change is made in reasonable understandings about the applicable federal constitutional

standards.[2] The other, illustrated by the approach of the dissenters in *ATA*, is to permit the States to take account of legitimate reliance interests in the formulation of remedies for unconstitutional taxation – to decide that no refund remedy need be afforded under state law in situations where the State has managed its fiscal affairs in reasonable reliance on accepted understandings about the constitutional landscape.

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[2] In this case, the plurality view provides ample support for the conclusion that changes in the substantive law in appropriate circumstances are made by legislatures *and* courts. This has been recognized by a variety of distinguished jurists, including Justice Felix Frankfurter, *see Griffin v. Illinois*, 351 U.S. 12, 26 (1956) (Frankfurter, J., concurring); Justice Benjamin N. Cardozo, *see Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364-65 (1932); Justice Oliver Wendell Holmes, *see Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting); and Justice Roger Traynor of the California Supreme Court, *see Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 29 Hastings L.J. 533 (1977). Regardless of the source, legislative or judicial, there is a need for principles intended to avoid the harsh consequences of the retroactive application of newly made law. In the legislative sphere, our Constitution has codified historical and specific prohibitions such as the ex post facto and impairment of contract clauses to avoid the hardship that retroactivity would entail. In the judicial sphere, the safeguard is inherent in the *assumption* that a court is applying *pre-existing* rules or norms to a defined set of facts or circumstances. Where a court articulates *new* rules or norms, however, that assumption fails, and the duty rests with the court to consider the impact of retroactive application of its new decision on the prior conduct of the parties. Where, as here, the new rule *creates* disputes between parties where none existed before, the court has a duty to provide for an orderly transition from the old rule to the new. *Chevron Oil*, appropriately applied, fulfills that duty.

From the perspective of managing the practical affairs of state government, it matters little which of these approaches is taken. The important point, which it is the purpose of this Amici Brief to urge upon the Court, is that a state's reliance on the long-accepted status quo in matters of state taxation – manifested here by a statute unobjected to by taxpayers for over forty years – ought to be taken into account in determining the state's remedial obligations. Whatever one's theory about whether it is appropriate for newly announced constitutional decisions to be subject to a "retroactivity" analysis, the fact is that in the practical affairs of state government taxation, fiscal planning is conducted on the basis of assumptions about the state of the law and those assumptions have been changed in recent years by decisions that have declared unconstitutional tax statutes that have been in effect and enforced without objections since the 1930s and 1940s.

For States to be constitutionally obligated to go back in time, to repay millions (in some cases, billions) of dollars for fiscal years that are already closed is unnecessary and unwise. It is unnecessary because not required for the effective implementation of the constitutional decisions of this Court. It is unwise because it has the practical effect of involving this Court in allocative decisions involving the best uses of billions of dollars of state revenues. It is for these reasons that any theory about the constitutional obligations of state government in cases such as the one now before the Court should take into account the financial stability and justifiable reliance interests of state government.

II. This Court's Decision in *McKesson* Is Not Inconsistent with the Denial of Retrospective Relief in Some Contexts Predicated upon the State's Justifiable Reliance Interests and Need to Engage in Sound Fiscal Planning

Justice Scalia and the members of the Court who dissented in *ATA* embrace the position that all constitutional decisions apply fully to cases still open on direct review under applicable principles of state law. This view addresses but one of the three major issues that may arise in a case such as the one now before the Court.

The first of the three issues raised in the context now before the Court is whether a recent constitutional decision (here *Bacchus*) is to be applied to the facts in litigation. This issue translates into whether a federal right has been violated by collection of the tax in question. If *Bacchus* is not to be applied retroactively (as application of the *Chevron* principles to the situation before the Court would suggest), then the case is over – no federal right has been violated.

By contrast, if *Bacchus* is to be applied retroactively, a second issue arises. As recognized by the Court in *McKesson* and by both the plurality and the dissenters in *ATA*, it is first and foremost up to state law to determine the remedies that are available when the illegal assessment of a state tax is alleged. There are no federal questions here – state courts have the initial responsibility to determine the nature of the available relief.[3]

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[3] Except for the brief statement in footnote 2 of its opinion, the Georgia Supreme Court did not address below the remedial options open under state law should it be determined that

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The third issue, one that need not be reached in this case because the Georgia Supreme Court has not yet had occasion to decide the second question, concerns the scope of the federal due process obligation of state courts

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federal law mandates the retroactive application of *Bacchus*. Footnote 2 stated:

> We are not persuaded by Beam's argument that OCGA § 48-2-35(a) mandates retroactive application of the constitutional decision. The statute provides, "A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him. . . ." The statute does not describe how it should be determined that a tax was "illegally assessed." It simply does not address the issue of retroactive versus prospective application of a constitutional decision.

James B. Beam Distilling Co. v. Georgia, 259 Ga. 363, ___ n.2, 382 S.E.2d 95, 96 n.2 (1989), *cert. granted*, 110 S.Ct. 2616 (1990).

As the plurality stated in *ATA*, 110 S.Ct. at 2330, "[t]he determination whether a constitutional decision of this court is retroactive . . . is a matter of federal law." The Supreme Court of Georgia in the case now under review applied the principles of *Chevron Oil* in deciding that *Bacchus* was not to be applied retroactively. Since no "plain statement" was made that principles of state law formed the basis for that decision, *see Michigan v. Long*, 463 U.S. 1032, 1041 (1983), this issue is now properly before the Court. Should the Court decide that *Bacchus* is to be applied retroactively in this context, the next question for decision, as indicated in the text, would be the scope of the available refund remedies under state law. Both *McKesson* and *ATA* make it clear that state courts are to be "entrusted with the initial duty of determining . . . relief." *ATA*, 110 S.Ct. at 2330. Hence, the appropriate disposition of this case if it is determined that *Bacchus* is to be applied retroactively would be a remand to the Georgia courts for further elaboration of the appropriate state remedies.

to provide more than a prospective remedy for taxes collected in violation of the Constitution. If the state courts deny retrospective relief under state law, in other words, the question is whether such denial accords with federal due process limitations. This issue was addressed by a unanimous Court in *McKesson*.

McKesson establishes that prospective relief alone is not adequate in a case where, on the facts, it was entirely foreseeable at the time of enactment of the state tax statute that the tax in question would be contested and invalidated. *McKesson* addressed the state interest in sound fiscal planning in the following passage:

> [W]e do not find this concern weighty *in these circumstances*. A State's freedom to impose various procedural requirements on actions for post-deprivation relief sufficiently meets this concern *with respect to future cases*. The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint; execute any refunds on a reasonable installment basis; enforce relatively short statutes of limitation applicable to such actions; refrain from collecting taxes pursuant to a scheme that has been declared invalid by a court or other competent tribunal pending further review of such declaration on appeal; and/or place challenged tax payments into an escrow account or employ other accounting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds. The State's ability *in the future* to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax.

McKesson, 110 S.Ct. at 2254-55 (emphasis added). The Court observed that "in the present case, Florida's failure to avail itself of certain of these methods of self-protection weakens any 'equitable' justification for avoiding its constitutional obligations to provide relief" and added that in any event Florida had ample notice that the statute in litigation in *McKesson* was potentially defective when measured against constitutional standards. From this it followed that Florida's "'equitable' justification for avoiding its constitutional obligation to provide relief" was without basis.

It does not follow from this reasoning, however, that in *all* cases where state taxes have been found to violate federal law the "ability [of the State] to engage in sound fiscal planning," *McKesson*, 110 S.Ct. at 2254, is an illegitimate consideration. Florida's ability "in the future" to invoke procedural protections of the sort listed above suffices to secure its interest in sound fiscal planning because it was clearly on notice that the tax in question was of doubtful legality.[4] The same point could not in fairness be made in a

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[4] The Court was explicit about this rationale in *McKesson*, 110 S.Ct. at 2257, where it gave two reasons for the conclusion that "the State's interest in financial stability does not justify a refusal to provide relief." The first was that "the State here does not and cannot claim that the Florida courts' invalidation of the Liquor Tax was a surprise, and even after the trial court found a Commerce Clause violation the State failed to take reasonable precautions to reduce its ultimate exposure for the unconstitutional tax." The second was that Florida could take procedural steps "in the future against any disruptive effects of a tax scheme's invalidation." The situation now before the Court is importantly different. The decision calling the Georgia tax statute into question *was* a surprise. And steps that Georgia – and other States now facing huge tax

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case where both the State and the taxpayer have had no reason to question the legality of a tax for thirty or forty years. In such a case, it is submitted, federal due process would not be violated by the restriction of relief to prospective invalidation of the tax.

There should be room in the applicable principles of federal due process, in other words, for consideration of the reliance interests of state government based upon reasonable assumptions about the stability of the law over time. This Court has been justifiably reluctant in other contexts, in particular those involving the Eleventh Amendment and liability for constitutional violations under 42 U.S.C. § 1983, to act as the creative agency for direct monetary liability against the state treasury. It has never suggested that *all* constitutional violations require full retrospective, compensatory monetary relief against state government. It would be ironic and unwarranted if taxpayer claims for the return of money paid without complaint and collected without suggestion of impropriety became an occasion for the direct imposition of monetary liability on the state treasury.

The plurality in *ATA* said that a state's "reliance interests may merit little concern" where it can "easily foresee the invalidation of its tax statutes." *ATA*, 110 S.Ct. at 2333. By contrast, the "potentially disruptive consequences for the State and its citizens" caused by a refund that "could deplete the state treasury, thus threatening the State's current operations and future plans," were regarded as among the valid

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refund claims – can take "in the future" are of little value to mitigate the disruption and financial instability now faced by many States based on events that have already occurred.

considerations counseling against retrospective recovery in cases where the State "cannot be expected to foresee" the invalidating decision. *Id.*

It is the purpose of this Amici Brief to urge that a realistic opportunity be afforded to the States to avoid the imposition of compensatory, retrospective money relief in contexts where it is unrealistic to expect fiscal planners to predict liability. This result should be achieved by a holding that unforeseeable constitutional decisions invalidating state taxes are not to be applied retroactively or, at the least, by a holding that reasonable limitations can be placed upon remedies. State government should not be required to divert literally billions of dollars from current budgets supported by the state treasury to compensate taxpayers who paid taxes that were proper under existing law and long tradition.

CONCLUSION

For the reasons stated, this Court should affirm the holding of the Georgia Supreme Court that the Petitioner is not entitled to the refund of taxes paid.

Respectfully submitted,

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